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Supreme Court, U.S.
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In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

WILLIAM TERRY, Warden, Georgia Diagnostics Prison,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

No court has examined Petitioner Troy Davis' compelling new evidence to determine if he is innocent. The Court of Appeals for the Eleventh Circuit affirmed the district court's refusal to examine Petitioner's evidence of innocence. If believed, the post-trial affidavits of numerous witnesses show that constitutional violations led to the conviction of an innocent man. In violation of this Court's precedent, no court has assessed the credibility of Mr. Davis' new evidence that underlies both his innocence and constitutional claims.

The question presented is:

> Can a habeas court avoid its role as a fact finder in substantial innocence cases by skipping the innocence "gateway" inquiry and ruling on a petitioner's constitutional claims when the innocence and constitutional issues arise out of the same facts?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Davis respectfully petitions for a writ of certiorari to review the opinion of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, App. 1, is reported at 465 F.3d 1249.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on September 26, 2006. *See* App. 1. The Court of Appeals for the Eleventh Circuit denied Mr. Davis' Petition for Rehearing and Petition for Rehearing e*n banc* on December 13, 2006. *See* App. 2. This Court previously granted Petitioner an extension of time to file a petition for writ of certiorari up to and including April 12, 2007. *See Troy Anthony Davis v. William Terry, Warden*, No. 06A824 (Thomas, J., in chambers) (Aug. 25, 2006). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution Article I, Section 9, clause [2], states, in relevant part: "The privilege of the Writ of Habeas Corpus shall not be suspended."

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any State

deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

INTRODUCTION

The Court of Appeals' decision presents an important question concerning the federal courts' role as fact finders in the disposition of capital cases involving actual innocence.

With the advent of DNA testing methods, the possibility of wrongful executions has been reduced and the causes of wrongful convictions have become evident. Most convictions of prisoners later found to be innocent have resulted from eyewitness misidentification, false confession, and perjury. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2545 (2006) (SOUTER, J., *dissenting*). Petitioner's case is a classic example of the unreliability of eyewitness testimony.

Both the State and Petitioner agree that the murder was committed by one of two men: Petitioner or State witness Sylvester Coles in a dimly-lit parking lot in the dark, early hours of the morning. New evidence has come to light that questions the core of the State's case in the form of eyewitness recantations, questionable police tactics and evidence from multiple affiants that State witness Red Coles committed the murder. Yet, no court has ever examined Petitioner's new evidence to determine if he is innocent.

The number of DNA exonerations averaged twenty per year between 2000 and 2003[1] and there is no reason to believe that the rate of wrongful convictions is lower in cases where DNA evidence is not available. When DNA evidence is not available, as it is not in this case, habeas courts must resort to more judicial assurances of guilt by examining new evidence that has come to light since trial and testing its credibility. Since not all cases involve forensic evidence, habeas courts must fulfill their duties as fact finders when petitioners present substantial non-forensic evidence of innocence. In this case, however, the lower courts conducted no examination of Petitioner's innocence. Allowing the Court of Appeals decision to stand creates two standards of review, one for petitioners that can show innocence through scientific evidence and a separate standard for those petitioners who can show innocence only through testimonial evidence. The Court of Appeals opinion allows courts to avoid their fact-finding function imposed by this Court's habeas jurisprudence in substantial innocence cases.

This Court should grant certiorari to consider whether habeas courts may bypass the "gateway" innocence issue in cases with substantial evidence of innocence or remand to the

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[1] *See* Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523 (2006).

Court of Appeals with direction to reconsider in light of this Court's innocence "gateway" jurisprudence. *See House v. Bell*, 126 S. Ct. 2064 (2006); *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

STATEMENT OF THE CASE

Petitioner appeals the denial of his petition under 28 U.S.C. § 2254 for a writ of habeas corpus.

In the early morning hours of August 19, 1989, Officer Mark McPhail was murdered in a parking lot in Savannah, Georgia. The incident started when Sylvester "Red" Coles began harassing a homeless man for a beer while Petitioner and others watched quietly from a distance. Coles verbally harassed and chased the homeless man to a nearby parking lot where the victim Officer McPhail was working. Coles threatened the retreating homeless man by exclaiming: "You don't know me. Don't walk away from me. I'll shoot you." Petitioner and others silently followed the scuffle. During the altercation, the homeless man was struck on the head with a pistol and yelled for the police. Officer McPhail responded and was shot dead with a .38 caliber weapon by the same man who had pistol-whipped the homeless man. The parking lot was dark and the scene was chaotic. After the dust settled, the police took the statements of several onlookers but had no suspects.

The next day, Red Coles and his attorney approached the police to exonerate Coles and identify Petitioner as the shooter. Mr. Coles did not mention that he had been carrying a .38 caliber gun -- the same caliber as the murder weapon -- on the night of the shooting. After Coles' self-interested revelation, the Savannah police never questioned Coles' involvement. The police never searched Coles' house for the murder weapon, never included Coles' picture in witness

photo spreads and paraded Coles in front of four State witnesses as a mere bystander in a crime scene "reenactment."[2]

A jury convicted Petitioner of murder, aggravated assault, obstruction of a law enforcement officer and possession of a firearm during a felony and sentenced him to death. The State's case rested on the testimony of several eyewitnesses, including Red Coles. Several trial witnesses identified Petitioner as the shooter in a photo line-up that did not include the pictures of Coles or anybody else at the scene. Other witnesses identified Petitioner at trial two years after the shooting and after extensive publicity.

Following his state direct appeals and collateral review, Mr. Davis filed a petition for writ of habeas corpus in 2001. Mr. Davis has submitted twenty-one affidavits to the district court that show (1) that Red Coles, and not Petitioner, shot officer McPhail; (2) the State withheld cumulatively material evidence from Mr. Davis in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) that the police testified falsely and knew that witness testimony was false, in violation of *Giglio v. United States*, 405 U.S. 150 (1972).

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[2] Despite the evidence against Coles, the police conducted a crime scene reenactment with Coles and four witnesses. During the reenactment, Coles played the part of a passive onlooker to the shooting. After the reenactment, the police asked two reenactment participants (State witnesses Harriet Murray and Dorothy Ferrell) to pick out the shooter from a photographic line-up which did not include a picture of Red Coles. Both witnesses identified Mr. Davis in the photographic line-up and again at trial. The remaining two witnesses at the reenactment, D.D. Collins and Larry Young, also implicated Petitioner at trial. In post-trial affidavits Collins, Ferrell and Young have all recanted their trial testimony, citing overly suggestive or intimidating police tactics; Murray has contradicted her testimony and implicated Red Coles.

No court has ever examined the full panoply of new evidence to determine if Mr. Davis is innocence. Four new witnesses have now implicated Coles, not Petitioner, in the murder of Officer McPhail. One eyewitness has come forward to testify that he was near the crime scene and saw Red Coles shoot McPhail, another three witnesses have stated that, since trial, Red Coles has bragged about killing Officer McPhail and escaping punishment.

In addition to the new evidence that implicates Coles, all of the State witnesses who testified against Petitioner -- save Red Coles and an eyewitness who disappeared after trial -- have recanted or contradicted their trial testimony. In fact, the only remnants of the State's case against Petitioner are the self-serving testimony of Red Coles and a questionable courtroom identification of Mr. Davis two years after the incident by Steven Sanders.[3]

The prosecution's case at trial relied on several witnesses who saw the assault of Larry Young, the murder of Officer McPhail or both. The State highlighted the testimony of two witnesses who told the jury that Troy Davis confessed to shooting Officer McPhail. Both of those witnesses have recanted. At trial, the State exclaimed that "every witness who saw only the beating of [the homeless man] Larry Young" said that Troy Davis did it. All of those witnesses – save Red Coles – have now recanted. At trial, the State told the jury that "every witness who saw only the shooting of Officer McPhail" identified Troy Davis as the shooter. That witness has recanted. At trial, the State told the jury that

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[3] As of the date of this petition, Petitioner's counsel has been unable to interview Mr. Sanders. Sanders' police statement on the night of the shooting states that he would not "recognize the shooter" contradicted his testimony two years later when he identified Mr. Davis for the first time at trial.

"every witness who saw both the assault on Larry Young and shooting of Officer McPhail say that the same guy did them both" and identified Troy Davis as the perpetrator. All of those witnesses – save Steven Sanders – have recanted or contradicted their trial testimony.

No court has ever reviewed any of this evidence to determine if Petitioner Davis is innocent. Instead, the district court and the Court of Appeals ignored the innocence "gateway" process established by this Court and evaluated Petitioner's constitutional claims on an incomplete record.

REASONS FOR GRANTING THE PETITION OR REMANDING TO CONDUCT AN INNOCENCE ANALYSIS

Allowing the Court of Appeals opinion to stand permits habeas courts to overlook even the most "extraordinary" cases of innocence. Had the lower courts examined Petitioner's extensive innocence evidence, as required by this Court, the constitutional deficiencies of Petitioner's trial would have become evident.

This Court's decisions make plain that credible claims of innocence cannot be ignored.

(A) Innocence plays an integral role in the amount of scrutiny habeas petitions receive. The Court's invocation of innocence as the "gateway" question for otherwise-barred constitutional claims ensures that the innocent receive proper attention and that non-meritorious claims do not consume scarce judicial resources. The lower courts' bypass of the innocence gateway grants the same cursory review to both the "extraordinary case" as it does the ordinary.

(B) This Court's opinion in *House v. Bell* shows that the gateway innocence inquiry requires that habeas courts thoroughly examine innocence evidence and make credibility determinations. The habeas court abandoned its role as fact finder by refusing to address Petitioner's innocence evidence.

(C) Had the habeas court fulfilled its role as fact finder, Petitioner would have shown that "a constitutional violation probably resulted in the conviction of an innocent man."

A. Innocence Plays an Integral Role in the Amount of Scrutiny Habeas Petitioners Deserve

The lower courts erred by ignoring Petitioner's innocence evidence. A habeas court must review a petitioner's innocence evidence before it may address the merits of procedurally defaulted constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 315 (1995). This Court has gone to great pains to balance the "quintessential miscarriage of justice" of executing an innocent man with the societal interests of finality, comity and the conservation of scarce judicial resources. *Id.* at 324-5. In striking such a balance, the Court has outlined a two-step process for determining whether a petitioner is entitled to review of procedurally barred constitutional claims because he is innocent.

The first "gateway" step requires that a petitioner establish his innocence under *Schlup's* gateway standard: "that in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* 327. If petitioner cannot establish his innocence, habeas relief is barred. Only the "truly deserving" habeas petitioner who can establish his innocence may reach the second step -- review of his

defaulted constitutional claims. *Id.* at 321. The *Schlup* innocence "gateway," recently reaffirmed by this Court, "ensures that a petitioner's case is truly extraordinary while still providing the petitioner with a meaningful avenue to avoid manifest injustice." *House v. Bell*, 126 S. Ct. 2064, 2076 (2006).

The district court and the Court of Appeals below bypassed the gateway issue of innocence and ruled on Petitioner's constitutional claims. Although the court acknowledged that Petitioner's innocence is the "threshold issue" under *Schlup*, it affirmed the district court "in declining to consider evidence of his actual innocence." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006). The Court of Appeals therefore ignored innocence evidence and proceeded to undergo a cursory examination of the merits of Petitioner's constitutional claims.

The Court of Appeals' reprioritization of judicial resources without regard to a petitioner's innocence threatens the delicate balance this Court has struck. *Schlup's* innocence gateway was meant to serve as a screen to conserve judicial resources for "those who were truly deserving." 513 U.S. at 321. Instead, the court reviewed Petitioner's claims without reference to whether his case was the "rare," "extraordinary case." *Id.* As a result, Petitioner received perfunctory review of his constitutional claims without the benefit of the fact-finding and credibility assessments required to make a *Schlup* innocence gateway determination. If the lower court's decision is accepted, the truly "exceptional" innocence cases that do not involve DNA evidence will be lumped together with non-meritorious masses, negating *Schlup's* insistence on justice for the innocent.

B. The Gateway Innocence Inquiry Requires That Habeas Courts Thoroughly Examine Innocence Evidence and Make Credibility Determinations

This Court's recent decision in *House v. Bell* underlines the importance of innocence determinations in capital habeas corpus cases. In *House*, decided last summer, the petitioner asserted his innocence as a gateway to his defaulted constitutional claims of ineffective assistance of counsel and prosecutorial misconduct. 126 S. Ct. at 2075. This Court engaged in extensive analysis of the innocence evidence and overruled the district court's factual findings, holding that House satisfied the *Schlup* innocence gateway standard. *See id.* at 2079-86. Although the district court had conducted an extensive evidentiary hearing and concluded that House was not innocent, this Court was compelled to scrutinize the State's forensic and testimonial evidence and make its own factual and credibility findings. *Id.* This Court's argument transcript and decision read more like trial briefs than Supreme Court records, with an examination of the innocence evidence uncharacteristic of an appellate court.[4]

This Court's reexamination of House's innocence evidence emphasized that the lower courts must take seriously

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[4] Samples of questions posed and answered by this Court included: Did the blood on House's pants really belong to the victim? If it was the victim's blood, did the lab reports prove that it was not spattered during the assault? How much autopsy blood was missing from the test tubes? When did it go missing? How close to the button of House's pants was one speck of blood? Were the witnesses who heard the victim's husband confess credible? Was the victim's husband's testimony credible? *See House v. Bell* Transcript at 7, 14, 15; 126 S. Ct. at 2079-85.

their roles as fact finders of last resort in innocence cases. The Court's unusual lack of deference to a district court's factual findings was not a result of the lower court's "clear error" or House's overwhelming innocence. As the Court stated, the Court was merely "uncertain" as to the basis of some of the habeas court's findings and House's innocence was "close" and not "a case of conclusive exoneration." *Id.* at 2078; 2086.

This Court's insistence in *House* that habeas courts analyze the facts of innocence cases and assess the credibility of new evidence is not new precedent. In *Schlup*, the Court held that "in the context of a request for an evidentiary hearing . . . the District court *must* assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Schlup*, 513 U.S. at 331-332 (emphasis supplied). The dissent in *House*, although dismayed by the majority's departure from standard appellate review, stated that "the point in *Schlup* was that ... the district court had to assess the probative force of petitioner's newly presented evidence by engaging in fact finding rather than performing a summary judgment-type inquiry." *House*, 126 S. Ct. at 2090 (Roberts, C.J., *dissenting*).

Fact finding and credibility determinations are so integral to the gateway innocence analysis that this Court in *House* took it upon itself to reverse the findings of the district court merely because it was "uncertain about" them. Here, the lower courts failed to make any innocence findings *at all*. The evidence establishing Petitioner's innocence underlies both his *Brady* and *Giglio* constitutional claims. As examined below, in part D, Petitioner's constitutional claims depend on the facts and credibility of the same evidence that shows that he is innocent. Had the lower courts applied *Schlup* and made the requisite factual and credibility determinations about "all the evidence," Petitioner could have demonstrated that "a constitutional violation probably resulted in the conviction of an innocent man." *See Schlup*, 513 U.S. at 327.

C. A Proper Gateway Innocence Analysis Informs and Improves a Habeas Court's Review of the Constitutional Issues

When habeas courts analyze substantial claims of innocence in accordance with this Court's precedent, the resulting factual and credibility determinations often bear upon the second step of the analysis -- petitioner's constitutional claims. A brief review of the "rare" instances where a Petitioner has shown his innocence demonstrates that constitutional issues are clarified when they are preceded by *Schlup* innocence analysis.

In *Schlup*, Lloyd Schlup, a Missouri prisoner, was convicted and sentenced to death for participation in the murder of a fellow inmate. *Id.* at 301. In his second habeas petition, Schlup claimed that (1) he was actually innocent and (2) his trial counsel was constitutionally ineffective under this Court's decision in *Strickland v. Washington*. This Court ordered the district court to consider "all the evidence" to determine if Schlup was actually innocent *before* it examined the merits of his constitutional claim. *Id.* at 331-32. The order of analysis proved important.

On remand, the district court conducted an evidentiary hearing, as ordered by this Court, and found that "more likely than not" Schlup was innocent in light of "all the evidence." *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995). The district court, then, granted constitutional relief based on the same evidence that proved Schlup's gateway innocence claim. *Schlup v. Bowersox*, 1996 WL 1570463, at *20 (E.D. Mo. May 2, 1996).

The district court noted that Schlup's evidence showing a *Strickland* constitutional violation was the "same evidence" that formed the basis of Schlup's innocence claim "which the [district] Court previously considered." *Id.*

Indeed, the district court cited the testimony of numerous eyewitnesses it found to be credible in Schlup's innocence evidentiary hearing to conclude that Schlup's trial counsel was constitutionally ineffective. *See id.* at 22-25. Thus, the district court's "conclusion that Petitioner satisfies the procedural actual innocence standard ... lends support to a conclusion that Petitioner also satisfies the less stringent *Strickland* standard." *Id.*

The ultimate resolution in *Schlup* shows that a proper gateway innocence analysis conducted in accordance with this Court's jurisprudence informs and improves a habeas court's constitutional analysis. Having conducted an evidentiary hearing to find that "all the evidence" showed that Schlup, "more likely than not", was innocent, the court also had the factual basis to conclude that Schlup's counsel was constitutionally ineffective.

In another case, *Cherrix v. Braxton*, the habeas court ordered an evidentiary hearing, noting that the facts of habeas petitioner's *Schlup* innocence claim would also establish that his trial counsel was constitutionally ineffective. 131 F. Supp. 2d 756, 770 (E.D. Va. 2001). In *Cherrix*, the victim was brutally raped and murdered in 1994. In 1997, petitioner was convicted of rape and murder based on DNA testing methods available at the time of the murder in 1994. Cherrix argued, and the court agreed, that an evidentiary hearing and DNA tests were required because the evidence underpinned both the petitioner's innocence claim and his claim that trial counsel had been constitutionally ineffective for failing to challenge and rebut the pathologist's testimony concerning the 1994 DNA test results when better methods existed at the time of trial.

D. Had the Lower Court Fulfilled its Role as Fact Finder and Examined Petitioner's Innocence Evidence, Petitioner Could Have Shown that "A Constitutional Violation Probably Resulted in the Conviction of an Innocent Man"

The Court of Appeals' bypass of the gateway inquiry resulted in a superficial review of Petitioner's constitutional claims. Had the courts below fulfilled its obligation to make factual and credibility findings about Petitioner Davis' innocence, Petitioner's alleged constitutional violations would have been apparent.

Petitioner submitted twenty-one affidavits to the district court showing he is innocent. Eight of the affidavits demonstrate not only Petitioner's innocence, but also that (1) the State withheld cumulatively material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and (2) that the police testified falsely and knew that witness testimony was false in violation of *Giglio v. United States*, 405 U.S. 150 (1972).

Under *Brady v. Maryland* and its progeny, the State is required to disclose material evidence to the defense. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). When police withhold evidence that could be used to attack the "integrity of the investigation" or "'carried within it the potential for the discrediting of the police methods employed in assembling the case,'" the State has violated *Brady*. *Id.* at 445-49. This Court has stressed that *Brady* evidence must be considered "collectively." *Id.* at 436.

In *Giglio v. United States*, the Supreme Court held that "the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary standards of justice." 405 U.S. 150, 153 (1972).

Police knowledge of false testimony is imputed to the State and the prosecutors. *Kyles*, 514 U.S. at 438 (citing *Giglio*, 405 U.S. at 154). False testimony is deemed material for purposes of *Giglio* unless such testimony is "harmless beyond a reasonable doubt." *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985).

The integrity and good faith of the police investigation is central to Petitioner's innocence and constitutional claims. Petitioner's innocence claim hinges, in part, upon the credibility of recanted trial witnesses. Many recanted witnesses explain that they testified falsely due to overly suggestive or intimidating police tactics. Likewise, the crux of Petitioner's *Brady* and *Giglio* claims is that police used "unreasonably suggestive" interrogation tactics to "pressure witnesses to make statements and/or identify Petitioner as the shooter." Petitioner's *Brady* claim alleges that the State failed to disclose such tactics and, had it done so, the bad faith of the investigation could have reasonably put the whole case in such a different light as "to undermine confidence in the outcome of ... Petitioner's trial." Petitioner's *Giglio* claim alleges State presented the testimony of witnesses that Savannah police officers knew to be false. Thus, Petitioner's innocence, *Brady* and *Giglio* claims all depend on the credibility of at least eight witnesses that the courts below never considered.

Although Petitioner requests only that this Court grant certiorari and remand to the district court to conduct the requisite innocence analysis, set out below is a brief discussion of several key affidavits that demonstrate how closely the gateway innocence analysis and the constitutional analysis are intertwined.

Larry Young's new affidavit is central to Petitioner's gateway innocence and *Brady* claims. At trial, Larry Young (the State witness who was assaulted with a pistol as Red

Coles harassed him) identified Petitioner as his attacker. Since it was undisputed that Officer McPhail's killer also assaulted Young, Young's trial testimony implicating Petitioner was key to the State's murder case. In his post-trial affidavit, Young states that he had initially told the police that he "*couldn't remember what anyone looked like or what different people were wearing ... [and] just couldn't tell who did what.*" After sustaining head injuries from a brutal assault, Young states that the police denied him medical treatment until "he told them what they wanted to hear," which consisted of answers the police "suggested" to him. The State left Mr. Young's initial statement out of its police report and never revealed that it had denied him medical treatment to elicit an identification of the shooter. Such revelations undermine the testimony of a key State witness and raise doubt as to the good faith and integrity of the investigation. When considered collectively with Petitioner's other affidavits, Young's new testimony is evidence not only that Petitioner is innocent but also evidence that the State withheld information about police tactics in violation of *Brady*.

Antoine Williams' new affidavit adds credence to Petitioner's innocence and *Brady* claims. At trial, Williams identified Petitioner as the assailant who struck Larry Young and killed Officer McPhail. The jury would have been troubled by Williams' in-court identification had they known that Williams, like Young, could not describe the shooter on the night of the crime and had repeatedly told the police that he "didn't know" what the shooter looked like because "it was dark, [his] windows were tinted, and [he] was scared." Had the habeas court conducted a gateway analysis, it would have determined that Williams' affidavit is credible evidence of innocence and that the State's failure to disclosure Williams' initial statement to the police that he "didn't know" what the shooter looked like supports Petitioner's alleged *Brady* violation.

Benjamin Gordon's new affidavit supports both Petitioner's innocence and *Brady* claims by casting doubt on the integrity and good faith of the police investigation. After Gordon testified as a State witness that he had never seen the shooter, the State introduced Gordon's police statement as affirmative evidence of Petitioner's guilt. Gordon's post-trial affidavit now describes how the police obtained his false statement. Gordon explains that the Savannah police "*came and dragged me from my house ... I was handcuffed and they put a nightstick in my neck. – at first, they called me a [expletive deleted] and told me that I had shot the officer. They told me that I was going to the electric chair. ... After four or five hours, they told me to sign some papers. I didn't read what they told me to sign, and they didn't ask me to.*"

If Gordon's affidavit is credible, the disclosure of the interrogation method used by the Savannah police, which is similarly described by Larry Young, Michael Cooper, Craig Young and D.D. Collins, would have been useful to impeach the content of Gordon's police statement.

Michael Cooper's new affidavit belies the integrity of the police tactics in ways that supports both Petitioner's innocence, *Brady* and *Giglio* claims. In his affidavit, Cooper declared that he "never told the police" what was contained in his police statement and that "[w]hat is written in that statement is a lie." The State failed to divulge that it had prepared Mr. Cooper's statement for him without reference to what he reported to the police. Although Cooper did not testify at trial, if Cooper's affidavit is credible, the disclosure of the police tactics would have been useful to impeach the credibility of the detective who had taken Mr. Cooper's statement -- Detective Ramsey.

Cooper's affidavit also raises a *Giglio* issue by calling into question the veracity of Ramsey's testimony. Cooper's

affidavit is irreconcilable with Detective Ramsey's testimony that "there were no suggestions made to any of the witnesses about who had in fact done the shooting." The truthfulness of Ramsey's testimony is also called into question by the new affidavits of Dorothy Ferrell, D.D. Collins and Jeffery Sapp.

The investigative techniques contained in Dorothy Ferrell's new affidavit support Petitioner's innocence, *Brady* and *Giglio* claims. Ferrell testified that she had identified Mr. Davis in a photographic line-up. In her affidavit, however, Ferrell admits that she lied at trial and that she never saw the shooting. Ferrell stated that Detective Ramsey showed her only one photograph, told her other witnesses had identified Mr. Davis and "*gave [her] the impression that [she] should say that Troy Davis was the shooter like the other witnesses had.*" If an evidentiary hearing shows that Ferrell's recantation is truthful, the State's failure to disclose the photo spread "technique" used with Ms. Ferrell will call into doubt her own testimony and the testimony of several other witnesses who identified Mr. Davis through a photographic line-up.[5]

As evidence of a *Giglio* violation, Ferrell's new affidavit directly conflicts with Detective Ramsey's trial testimony that he showed Ferrell multiple photographs before she identified Petitioner. Again, the credibility of Ramsey's testimony is also contradicted by Michael Cooper, D.D. Collins and Jeffery Sapp.

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[5] The Court of Appeals held that Ferrell's affidavit is not *Brady* evidence because Ferrell initiated contact with the district attorney by letter to seek a favor. Detective Ramsey secured Ferrell's photo identification of Mr. Davis on August 29, 1989. Ferrell contacted the district attorney on March 23, 1990. Thus, the State first contacted Ferrell to suggest that Mr. Davis was the shooter.

D.D. Collins testified at trial that Petitioner assaulted Larry Young. After trial, Collins swore that he told Detective Ramsey he had not "*see[n] Troy do nothing, and they kept telling me that I was going to jail as an accessory. . . . I told them that it was Red and not Troy who was messing with that man, but they didn't want to hear that. It was, 'Troy did this, Troy did that.' The detectives told me fine, have it your way, kiss your life goodbye, because you're going to jail . . .. I finally broke down and told them what they wanted to hear. They would tell me things that they said happened and I would repeat whatever they said . . . I just wanted to go home.*"

Mr. Collins' false testimony and police statement were a centerpiece of the State's case. Had the State disclosed that Collins' testimony was a product of police intimidation and suggestion, the importance of his testimony would have been drastically reduced and the integrity of the investigation would have been called into doubt. The State's failure to disclose Collins' interrogation technique supports Petitioner's *Brady* and innocence claims. Moreover, Collins' affidavit supports Petitioner's *Giglio* claim that Detective Ramsey lied at trial. Ramsey testified that he had not coerced or threatened Collins "in any way" and claimed that Collins "was real cooperative." Collin's new affidavit questioning the veracity of Detective Ramsey's testimony is corroborated by new evidence from Michael Cooper, Dorothy Ferrell and Jeffery Sapp. Alternatively, Detective Ramsey knew that Collin's testimony implicating Petitioner was false and failed to correct it in violation of *Giglio*.

Craig Young's trial testimony also lends support to Petitioner's innocence, *Brady* and *Giglio* claims. The State introduced Craig Young's police statement as evidence that Petitioner had gotten into an altercation prior to the shooting. Consistent with the description of the other eight witnesses, Young told the jury that his police statement was a product of

pressure from the police, explaining in his new affidavit that Savannah Detective Carl Ramey "told me when I came there that I knew all this stuff. Hey, man, he was like hollering at me, telling me stuff I already – I knew that I didn't know. So he was just like telling me, going step by step, telling me, you know." Detective Ramey disputed Young's account by testifying that he had not "put any words in Craig Young's mouth." If Young's affidavit is credible, the new evidence supports Petitioner's innocence by undermining the police investigation. The police tactics, withheld by the State and contradicted by Detective Ramey, also lend support to Petitioner's *Brady* and *Giglio* claims.

Jeffrey Sapp, another chief State witness, testified at trial that Petitioner confessed to him that he had shot Officer McPhail. In his post-trial affidavit, however, Sapp recants his testimony. Sapp explains that "*the police came to me and talked to me and put a lot of pressure on me to say 'Troy said this' or 'Troy said that.' They wanted me to tell them that Troy confessed to me about killing that officer. The thing is, Troy never told me anything about it. I got tired of them harassing me, and they made it clear that the only way they would leave me alone is if I told them what I wanted to hear. ... When it came time for Troy's trial, the police made clear to me that I needed to stick to my original statement, that is, what they wanted me to say.*"

Sapp's recantation undermines key State evidence of Petitioner's guilt and provides evidence that the State withheld evidence of interrogation methods that could have been used to attack the integrity of the investigation. Allowing Sapp to commit perjury when the interrogating police knew his testimony to be false is a *Giglio* violation.

The integrity of the police investigation is a common element to Petitioner's innocence, *Brady* and *Giglio* claims. Without the benefit of a properly conducted gateway

innocence analysis, the courts below could not gauge the credibility of the affiants and, therefore, could not properly assess whether the disclosure of the investigation tactics constituted a *Brady* violation -- i.e., whether the disclosure of police tactics could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435 -- or whether Savannah police Detectives testified falsely or knew State witness testimony to be false in violation of *Giglio*. A gateway innocence analysis conducted in conformity with *House* and *Schlup* would assess the credibility of the affiants listed above to determine if Petitioner is innocent.

To prove he is innocent, Petitioner must show that it is "more likely than not" that no reasonable would convict him in light of the new evidence. To show that the State violated *Brady*, Petitioner must show that had the State disclosed the suppressed evidence a different result at trial was "reasonably probable." If the gateway innocence analysis found the State witness recantations credible, the affiants' testimony could affect both the habeas court's innocence determination and *Brady* materiality finding in four critical respects.

First, disclosure of the initial, unrecorded police statements of Young, Williams, Sapp and Collins, all of which contradicted their trial testimony, would have provided powerful impeachment evidence for those key state witnesses. The impeachment of Young, Collins, Williams and Sapp would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.

Second, disclosure of the police tactics used to secure the testimony of six of the eight witnesses discussed above corroborates issues raised at trial. Despite trial testimony of intimidating or overly suggestive police tactics from Craig Young and D.D. Collins, the jury had to consider the integrity of the police investigation without the corroborating accounts

of Larry Young, Antoine Williams, Jeffrey Sapp, Dorothy Ferrell, Benjamin Gordon and Michael Cooper. Indeed, the State was able to discount the testimony of Craig Young and D.D. Collins in its closing statement by arguing that "every one of the [witnesses who alleged police intimidation] had some connection with Troy Anthony Davis or the neighborhood he hangs out in." Larry Young, Antoine Williams, Benjamin Gordon, Michael Cooper and Dorothy Ferrell had no connection to Mr. Davis and no reason to lie for his benefit at trial. Had the State not suppressed the tactics used for these witnesses, the jury may have questioned the integrity of the investigation.

Third, disclosure of the police tactics used on the *eight* witnesses discussed above would have undermined the testimony of the two remaining eyewitnesses. This Court has held that the impeachment of one eyewitness may cause the jury to question the credibility of other witnesses. *Kyles*, 514 U.S. at 445. Here, the two State eyewitnesses who have not claimed police wrongdoing conformed their stories to the State's theory after Mr. Davis became the sole target of the investigation.[6] With evidence of intimidating and unduly suggestive police tactics used on eight other witnesses, reasonable jurors may have disregarded the trial identifications of the remaining two witnesses as another example of untrustworthy police intimidation or suggestion.

---

[6] State witness Harriet Murray's preliminary hearing testimony and initial police statement implicated Red Coles as the shooter. Nonetheless, she identified Mr. Davis two years later at trial. Murray's affidavit also implicated Coles. Steven Sanders' police statement taken the night of the shooting stated that he would not "recognize the shooter" contradicted his testimony two years later when he identified Mr. Davis in court.

Lastly, damage to the State's case would not have been confined to eyewitness evidence, for disclosure of the investigation tactics used by police raised opportunities to attack the thoroughness and the good faith of the investigation. *See id.* The collective evidence of untrustworthy police tactics would have created such skepticism of the State's eyewitnesses that reasonable jurors may question the reliability of the investigation in failing to investigate Red Coles. In light of the interrogation tactics discussed above, the failure of the police even to consider Red Coles a suspect, include his picture in the eyewitness photo spread or search his house for the murder weapon casts doubt on the outcome of Petitioner's trial. Thus, revelation of the police investigative tactics could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

CONCLUSION

The petition for a writ of certiorari should be granted, or, remanded with an order to the district court to consider Petitioner's innocence evidence to determine if it may consider the merits of his otherwise-barred constitutional claims.

Respectfully submitted,

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April 11, 2007

APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED SEPTEMBER 26, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13371

D. C. Docket No. 01-00290-CV-4

TROY ANTHONY DAVIS,
Petitioner-Appellant,
versus
WILLIAM TERRY, Warden,
Georgia Diagnostic Prison,
Respondent-Appellee.

Appeal from the United States District court
for the Southern District of Georgia

(September 26, 2006)

Before DUBINA, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

Troy Anthony Davis appeals the denial of his petition under 28 U.S.C. § 2254 for a *1251 writ of habeas corpus. Davis was convicted and sentenced to death for crimes that occurred in two separate incidents on the same night. First, Davis was convicted of shooting into a car on Cloverdale Drive in a subdivision of Savannah, Georgia. Michael Cooper, who was sitting in the front passenger seat of the car, was severely injured by a bullet that lodged in his right jaw. Davis was also convicted of striking Larry Young in the head

with a gun later that night in a Savannah parking lot, and of fatally shooting police officer Mark Allen McPhail as McPhail responded to the altercation.

Davis' convictions and death sentence were affirmed by the Supreme Court of Georgia. Davis v. State, 263 Ga. 5, 426 S.E.2d 844 (1993). His state habeas court petition for relief was denied in 1997, Davis v. Turpin, Civ. Action No. 94-V-162, Order of Sept. 5, 1997 (entered Sept. 9, 1997), and the Supreme Court of Georgia affirmed. Davis v. Turpin, 273 Ga. 244, 539 S.E.2d 129 (2000). Davis then filed his federal habeas petition, whose denial by the District court is the subject of this appeal.

Davis' petition for habeas corpus is based essentially on his claim that newly discovered evidence indicates both that he did not receive a fair trial and that, under the standard set forth in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808 (1995), he is actually innocent of murdering Officer McPhail. In Schlup, the Supreme Court described two types of claims pertaining to actual innocence that might be made after trial. First, the Court addressed the substantive claim of actual innocence, as asserted in Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993), that execution of an innocent person violates the Eighth Amendment even if a conviction was the product of a fair trial.FN1 Second, the Court recognized the procedural claim, asserted by Schlup, that conviction of an innocent person is constitutionally impermissible when the conviction was the product of an unfair trial. The Court held that when a death-sentenced prisoner makes a successful showing of actual innocence, procedural default alone cannot bar consideration of his constitutional claims of an unfair trial.

FN1. The viability of this claim remains an open question as the Court did not reach it, finding that Herrera had failed to make a "truly persuasive demonstration of 'actual innocence.' " Herrera, 506 U.S. at 417, 113 S. Ct. 853.

In this case, Davis does not make a substantive claim of actual innocence. Rather, he argues that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence under Schlup.FN2 Specifically, Davis argues that:

FN2. To pass through the Schlup "gateway," a petitioner's new evidence must "establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial." Schlup, 513 U.S. at 316, 115 S. Ct. 851 (emphasis in original). Establishing sufficient doubt of guilt does not, under Schlup, refer to the strict "clear and convincing" standard of Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992), but rather the lesser standard of Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986), which only requires a petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 326-27, 115 S. Ct. 851. The Supreme Court painstakingly explained the terms of the Carrier/Schlup standard. First, a habeas court cannot reject a petitioner's claim "solely because" there remains "sufficient evidence to support the jury's verdict." Id. at 331, 115 S. Ct. 851. Instead, the court must "consider what reasonable triers of fact are likely to do." Id. at 330, 115 S. Ct. 851. The Court described a "reasonable" juror as one who fairly considers all of the evidence presented and conscientiously obeys the instructions of the trial court requiring proof beyond a reasonable doubt. See id. at 331, 115 S. Ct. 851. After articulating the appropriate standard, the Court remanded for an evidentiary hearing to determine "the probative force" and reliability "of the newly presented evidence in connection with the evidence of guilt adduced at trial." Id. at 332, 115 S. Ct. 851.

(1) The district court erred as a matter of law in declining to address Davis' *1252 claim of actual innocence by: (a)

refusing to examine all of the evidence of his actual innocence; (b) reaching Davis' constitutional claims before considering the gateway issue of his actual innocence; (c) applying the standards of 28 U.S.C. § 2254(e)(2) to deny Davis an evidentiary hearing on the question of his actual innocence; and (d) failing to recognize that Davis has made a colorable showing of actual innocence.

(2) The State violated Davis' due process and fair trial rights by its knowing use of material false evidence and by withholding material exculpatory evidence.

(3) Trial counsel was constitutionally ineffective for failing to conduct adequate pretrial investigation and for ineffectively representing Davis at trial.

(4) Davis' trial was fraught with procedural and substantive errors, including Confrontation Clause violations, which in combination deprived him of a fundamentally fair trial as guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.FN3

FN3. We note at the outset that Davis provides no particular factual support for this claim other than a very brief assertion of a Confrontation Clause violation. Specifically, he challenges a single statement within Officer Lorenzo Brown's testimony regarding a shell casing that linked the murder of Officer McPhail to the Cloverdale shooting. Brown testified that he was given the casing by a homeless man who claimed to have found it "on the lawn of the trust company bank." On appeal, Davis complains that he did not have the opportunity to confront the homeless man, but he did not raise this argument in his habeas petition. The argument was not considered by the district court and will not be considered here. See Thomas v. Crosby, 371 F.3d 782, 800 (11th Cir.2004) (Tjoflat, J., specially concurring) ("[A]ppellant's failure to press the argument before the district court foreclosed its right to present it on appeal." (quoting First Ala. Bank of Montgomery, N.A. v. First State Ins. Co., 899 F.2d

1045, 1060 n. 8 (11th Cir.1990) (internal quotation marks omitted))).

DISCUSSION

Certainly, the threshold question in this case is whether Davis is entitled to consideration of his claims of an unfair trial when, as he concedes, those claims are procedurally defaulted for failure to present them to the state court. FN4 Davis recognizes that, notwithstanding the procedural bar, the district court did consider the merits of his constitutional claims and rejected them as a matter of law. He nonetheless argues that the district court erred in declining to consider evidence of his actual innocence and instead reached the merits of his constitutional claims. Davis cannot prevail on this issue. As noted above, the procedural claim of actual innocence under Schlup is permitted in order to assure consideration of constitutional claims of an unfair trial where those claims have been procedurally defaulted. Davis received precisely such substantive consideration. He cannot be heard to complain that the test for achieving a desired result was not applied, or not applied correctly, when the desired result was, in fact, obtained. Accordingly, we now turn to the true gravamen of this appeal: the question of whether the district court erred in concluding that Davis' constitutional claims of an unfair trial, as he asserts them in this case, must be rejected as a matter of law.

FN4. None of Davis' current claims of an unconstitutional trial were raised in the direct appeal of his conviction. Thus, the state habeas court ruled that they were waived and procedurally barred pursuant to Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754, 754-55 (1985). Because a federal habeas court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991), this Court is likewise precluded from considering

these constitutional claims. A petitioner may surmount this procedural bar in one of two ways. First, a petitioner's defaulted claims can be reviewed if he can show cause excusing the default and prejudice arising therefrom. See Dretke v. Haley, 541 U.S. 386, 392-93, 124 S. Ct. 1847, 158 L.Ed.2d 659 (2004). Second, because "[t]he cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice[,]" id. at 393, 124 S. Ct. 1847, a petitioner may still obtain review of his constitutional claims, even if he cannot show cause and prejudice, only if his case "implicat[es] a fundamental miscarriage of justice." Schlup, 513 U.S. at 314-15, 115 S. Ct. 851 (1995) (quoting McCleskey v. Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991)); Mincey v. Head, 206 F.3d 1106, 1136 (11th Cir.2000). It would be considered a fundamental miscarriage of justice if "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup, 513 U.S. at 327, 115 S. Ct. 851 (quoting Murray, 477 U.S. at 496, 106 S. Ct. 2639) (internal quotation marks omitted).

Davis first argues that his constitutional right to a fair trial was violated because the State knowingly presented false testimony which had been coerced by the police to obtain his conviction. Specifically, Davis argues that the State violated his Fourteenth Amendment right to due process by offering material evidence that state agents knew to be coerced and false in violation of Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972). Davis also argues that the State failed to provide him with exculpatory impeachment evidence of the coercive investigative tactics used to obtain the false testimony in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Additionally, Davis argues that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment, citing trial counsel's failure to investigate possible police coercion of witnesses, to interview critical eyewitnesses prior

to trial, and to properly prepare for trial. We address each claim in turn.

I. Giglio Claim

Giglio error, a species of Brady error, occurs when "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." Ventura v. Att'y Gen., Fla., 419 F.3d 1269, 1276-77 (11th Cir.2005) (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976)). In order to prevail under Giglio, Davis must establish that: (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material-i.e., that there is "any reasonable likelihood" that the false testimony "could ... have affected the judgment." Giglio, 405 U.S. at 154, 92 S. Ct. 763; see also Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir.1999). Davis fails to meet this standard.

The only Giglio argument actually asserted in Davis' federal habeas petition (as opposed to his appeal brief) is that the prosecution knowingly presented the false testimony of Kevin McQueen and vouched for this allegedly false testimony. But Davis fails to make any specific allegations tending to show that the government knew McQueen's statement to be false. At trial, the State introduced McQueen's sworn *1254 statement that, when the two were inmates together, Davis confessed to the killing. In his present affidavit McQueen asserts that he "made up the story about the confession" in order "to get even with" Davis after an argument.

But as the district court correctly stated:

A showing of state misconduct requires, at a minimum, an allegation that the State presented McQueen's testimony while knowing it was false. McQueen's affidavit,

accepted as truthful for the sake of argument, shows only that McQueen, on his own and prompted by no one else, sought to take out his anger against Petitioner by lying to a jail warden, by making a false statement to a police officer, and by lying to the court and the jury when he testified that Petitioner confessed to shooting Officer McPhail. McQueen did not present the affidavit recanting his testimony until well after the trial had ended, and no evidence has been presented to indicate that the State knew that his trial testimony was false.

Based on this sole allegation regarding Kevin McQueen, Davis cannot support a Giglio claim as a matter of law.

Although not referenced in his habeas petition, Davis did attach to his petition the affidavits of other witnesses, which he now argues in his brief additionally support his Giglio claim. We have carefully reviewed these affidavits and conclude that, as a matter of law, they are insufficient to support a Giglio claim, either because the assertions contained therein do not rise to the level of coercive police conduct,FN5 or because there is no reasonable likelihood that the false testimony could have affected the jury's judgment.FN6 See United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir.1995).

FN5. For example, the "coercion" alleged in some affidavits goes no further than being "told" by the police to sign a statement. In those affidavits, the affiant claims he did not read the statement at the time he signed it but now claims that its contents were false.

FN6. For example, the allegation that D.D. Collins' interrogation was coercive was raised at trial and obviously did not impact the jury's finding of guilt.

II. Brady Claim

To prevail on his Brady claim, Davis would have to prove that: (1) the government possessed evidence favorable to him; (2) the defendant did not possess the evidence and

could not have obtained it with reasonable diligence; (3) the government suppressed the favorable evidence; and (4) the evidence was material. LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1268 (11th Cir.2005) (citing United States v. Meros, 866 F.2d 1304, 1308 (11th Cir.1989)). Davis alleges that the State violated Brady by failing to disclose material exculpatory evidence concerning Dorothy Ferrell-namely, that Ferrell, who testified against Davis at trial, had contacted the district attorney's office regarding the possibility of a favorable disposition in an impending criminal action against her in exchange for her testimony in Davis' case. Davis says this omission was material because Ferrell's testimony was important in securing a guilty verdict against him.

At trial, Ferrell, who was staying in a hotel across the street from the murder scene, testified on behalf of the State. She identified Davis as the shooter after her memory was triggered by a picture of Davis on the seat of a police car. She then picked Davis out of a five-person photographic line up and identified Davis at trial.FN7 After Ferrell testified, defense *1255 counsel's wife received a phone call from a person purporting to be Dorothy Ferrell saying that someone in the state attorney's office had told Ferrell they would help her if she testified in Davis' case, and that Ferrell's testimony at Davis' trial had been completely false. When defense counsel informed the state attorney of the phone call, the state attorney revealed Ferrell's written request for assistance in a criminal case in which she was a defendant. Her letter stated that if the prosecutor would help, "I promise you, you will not be making a mistake." Recalled by the judge to explain, Ferrell denied making the phone call. Though she admitted to writing the letter, she denied that the prosecutor helped her. The judge then offered, and defense counsel declined, to recall Ferrell to the stand.

FN7. Ferrell now claims that the police did not present her with a photographic line-up, but simply showed her one photograph of Davis. However, as noted above, it was

Ferrell herself who initially and voluntarily identified Davis as the shooter.

Because it is clear that the defense was aware at trial of Ferrell's contact with the state attorney's office, there was no Brady violation. Moreover, this claim was presented to the state habeas court, which found that "there was 'no suppression of any understanding or agreement for prosecutorial leniency and no grounds for reversal.' " Because there was no clear and convincing evidence to the contrary, the district court accepted the state habeas court's finding of fact that there was no suppression of any understanding or agreement. Although the prosecution had an obligation to advise defense counsel of Ferrell's call, the state habeas court found that the omission was not material, citing the defense team's reason for not calling Ferrell back to testify once it found out about the call: "We weren't going to get very far with this witness, simply because we had fairly impeached her on the issue of shoplifting."

III. Ineffective assistance of counsel

Likewise, Davis cannot establish a successful claim of ineffective assistance of counsel. Davis essentially argues that his counsel was ineffective because:

1. Counsel failed to contact Joseph Blige, who allegedly could have furnished evidence that Davis had no fight with anyone at the Cloverdale party.

2. Counsel failed to ask defense witness Joseph Washington about the shirt that Red Coles was wearing, information that would have been exculpatory in light of other evidence presented to the jury.

3. Counsel failed to interview April Hester, who hosted the Cloverdale party and saw Red Coles acting "nervous and upset" soon after McPhail's shooting.

4. Counsel failed to effectively impeach Larry Young, Harriet Murray, Red Coles, and Stephen Sanders.

A successful claim under Strickland has "two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Davis fails, as a matter of law, to meet this standard. His counsel's alleged instances of misconduct, even if true, do not add up to a performance so deficient that it deprived Davis of a fair trial. A review of the trial *1256 transcript reveals that Davis' counsel were fully prepared for trial and presented a viable defense: a case of mistaken identity. Counsel extensively cross-examined the State's witnesses to show that they were not trustworthy and to raise doubt about the witnesses' alleged observations of the shooting. Counsel also presented significant testimony that Red Coles was the person who had committed the murder. Most importantly, none of the testimony which Davis asserts counsel should have obtained would overcome the prejudice requirement of Strickland in light of the totality of the evidence presented at trial.

Having very carefully considered this record, we cannot say that the district court erred in concluding that Davis has not borne his burden to establish a viable claim that his trial was constitutionally unfair.

AFFIRMED.

APPENDIX B -- ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC BY THE OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED DECEMBER 13, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13371

Filed
U.S. Court of Appeals
Eleventh Circuit
December 13, 2006
Thomas K. Kahn
Clerk

TROY ANTHONY DAVIS,
Petitioner-Appellant,
versus
WILLIAM TERRY, Warden,
Georgia Diagnostic Prison,
Respondent-Appellee.

Appeal from the United States District court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion September 26, 2006, 11th Cir., 2006, __ F.3d__).

Before DUBINA, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/Rosemary Barkett

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
061407 APR 11 2007
OFFICE OF THE CLERK

NO. 06-

In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

WILLIAM TERRY, Warden, Georgia Diagnostics Prison

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL APPENDIX

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April 19, 2007

* Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TROY ANTHONY DAVIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CV 401-290**
	)	
FREDERICK HEAD, Warden,	)	
Georgia Diagnostic Prison.	)	
Respondent.	)	

ORDER

Troy Anthony Davis ("Petitioner") petitions the Court under 28 U.S.C. § 2253 for issuance of a certificate of appealability (COA) of this Court's denial of his petition for habeas corpus relief under 28 U.S.C. § 2254.

"[W]hen a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition . . ., the right to appeal is governed by the certificate of appealability (COA) requirements now found at 28 U.S.C. § 2253(c)." Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L. Ed. 2d 542 (2000).

28 U.S.C. § 2253 (c) provides in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.
>
> . . . .

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253 (c)(1)(A), (2), (3).

The United States Supreme Court identified the following standard that is to be applied in granting a COA:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order maybe taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 478,120 S.Ct. at 1600-01; see also, e.g., Peoples v. Haley, 227 F.3d 1342, 1344-45 (11th Cir. 2000) (remanding with instruction that specific issue or issues were to be identified as satisfying § 2253(c)(3's) "substantial showing of the denial of a constitutional right").

Thus, pursuant to binding precedent and § 2253, this Court may issue a COA to Petitioner for claims denied on procedural grounds only if the Court finds that he has made a substantial showing of the denial of a constitutional right.

In this case, the Court finds that Petitioner has made no substantial showing of the denial of a constitutional right and that jurists of reason would not find it debatable as to whether this Court was correct in its rulings. Accordingly,

Petitioner's motion for a certificate of appealability (Doc. 58) is **DENIED**.

So ORDERED.

JOHN F. NANGLE
UNITED STATES DISTRICT JUDGE

Date: July 20, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TROY ANTHONY DAVIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CV 401-290**
	)	
FREDERICK HEAD, Warden,	)	
Georgia Diagnostic Prison,	)	
Respondent.	)	

ORDER

Before the Court is Petitioner's motion to amend the judgment entered on May 13, 2004 (Doc. 51), denying Petitioner's application for writ of habeas corpus. Petitioner specifically requests that the Court alter and amend the denial of habeas relief as to Claim Four (concerning alleged State misconduct) and Claims Five and Six (concerning alleged ineffective assistance of counsel). Petitioner also requests that the Court alter and amend the denial of Petitioner's motion for an evidentiary hearing (Doc. 44) and/or the denial of his motion to hold the federal habeas proceedings in abeyance pending resolution of further state court proceedings (Doc. 50).

Petitioner posits *(1)* that the Court erred as a matter of law regarding Petitioner's request for an evidentiary hearing based upon his innocence or, alternatively, his request to hold the case in abeyance pending resolution of further state court proceedings based upon his claims relating to innocence, *(2)* that the Court erred as a matter of law and fact regarding Petitioner's claim of innocence based upon the combined effects of state misconduct and ineffective assistance of counsel, and *(3)* that the Court wrongly refused to consider

the evidence developed during federal proceedings which supports Petitioner's innocence when assessing whether this case meets the miscarriage of justice exception.

Petitioner's memorandum in support of the instant motion is clear and narrows the issues and arguments in support thereof to their essence. That memorandum does not, however, present any argument that the Court has not already exhaustively considered in issuing its previous Orders in this proceeding.

Accordingly, Petitioner's motion to alter and amend the judgment (Doc. 53) is **DENIED**.

So ORDERED.

JOHN NAGLE
UNITED STATES DISTRICT JUDGE

Date: June 3, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TROY ANTHONY DAVIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CV 401-290**
	)	
FREDERICK HEAD, Warden,	)	
Georgia Diagnostic Prison,	)	
Respondent.	)	

ORDER

Petitioner Troy Anthony Davis, asserting 17 claims for relief, petitions this Court for writ of habeas corpus under 28 U.S.C. § 2254, which provides in part pertinent to this proceeding:

> [A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> . . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (a), (d), (e)(1).

I. Procedural Background

In 1991 a jury in Chatham County, Georgia, found Petitioner guilty of the 1989 murder of Savannah police officer Mark Allen McPhail, obstruction of Officer McPhail, aggravated assault of two other individuals, and possession of a firearm during the commission of a felony. Petitioner was sentenced to death for Officer McPhail's murder.[1] In 1992

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[1] The Georgia Supreme Court summarized the facts of the case as follows:

> At midnight, on August 18,1989, the victim, a police officer, reported for work as a security guard at the Greyhound Bus Station in Savannah, adjacent to a fast food restaurant. As the restaurant was closing, a fight broke out in which Davis struck a man with a pistol. The victim, wearing his police uniform - including badge, shoulder patches, gun belt, .30 revolver, and night stick - ran to the scene of the disturbance. Davis fled. When the victim ordered him to halt, Davis turned around and shot the victim. The victim fell to the ground. Davis, smiling, walked up to the stricken officer and shot him several more times. The officer's gun was still in his holster.

(footnote continued on next page)

the trial court denied his motion for a new trial. His convictions and death sentence were affirmed by the Supreme Court of Georgia, Davis v. State, 263 Ga. 5, 426 S.E.2d 844 (1993), and the Supreme Court of the United States denied his petition for a writ of certiorari, Davis v. Georgia, 510 U.S. 950, 114 S. Ct. 396, 126 L. Ed. 2d 344 (1993).

In 1994 Petitioner filed a petition for Wit of habeas corpus ("state habeas petition") in the Superior Court of Butts County, Georgia ("state habeas court"). In 1995 the state habeas court denied Petitioner's motion for continuance of a scheduled evidentiary hearing. The Georgia Supreme Court granted Petitioner's motion for immediate review of that denial and concluded that the state habeas court had abused its discretion in denying the continuance, Davis v. Thomas, 266 Ga. 835, 837-38, 471 S.E.2d 202, 204 (1996).

In 1997, after conducting an evidentiary hearing, the state habeas court denied Petitioner's state habeas petition. Davis v. Turpin, Civ. Action No. 94-V-162, Order of Sept. 5, 1997 (entered Sept. 9, 1997), slip op. at 1 (hereinafter "State Habeas Order"). On November 13, 2000, the Georgia Supreme Court affirmed the denial of state habeas relief,

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(footnote continued from previous page)

> The victim wore a bullet proof vest, but the vest did not cover his sides and the fatal bullet entered the left side of his chest, penetrated his left lung and aorta, and came to rest at the back of his chest cavity. The officer was also shot in the left cheek and the right leg.
>
> The next afternoon, Davis told a friend that he had been involved in an argument at the restaurant the previous evening and struck someone with a gun. He told the friend that when a police officer ran up, Davis shot him and that he went to the officer and "finished the job" because he knew the officer got a good look at his face when he shot him the first time.
>
> After his arrest, Davis told a cellmate a similar story.
>
> Davis v. State, 263 Ga. 5, 5-6, 426 S.E.2d 844, 846 (1993).

Davis v. Turpin, 273 Ga. 244, 539 S.E.2d 129 (2000), and on October 1, 2001, the Supreme Court of the United States denied certiorari, Davis v. Turpin, 534 U.S. 842, 122 S. Ct. 100, 151 L. Ed. 2d 59 (2001).

On December 14, 2001, Petitioner filed a petition for writ of habeas corpus ("federal habeas petition") in this Court. A summary of the procedural background in this Court follows.

On December 14, 2001, Petitioner filed his federal petition (Doc. 2; see also Docs. 10, 14, 17, 18, 19, 20, 21). The Court granted attorney Thomas Dunn's motion to appear pro hac vice on Petitioner's behalf (Doc. 15). Petitioner filed a motion to conduct discovery and to authorize payment of expert and investigative expenses (Docs. 28, 29; see also Docs. 27, 30, 31, 33, 34). The Court denied the discovery motion (Doc. 32; see also Docs. 35, 36, 37, 41) and the request for expert and investigative assistance (Doc. 44).

Petitioner filed a motion for evidentiary hearing (Doc. 38; see also Doc. 39) and a motion for oral argument regarding the motion for evidentiary hearing (Doc. 42; see also Doc. 43). The Court denied those motions (Doc. 44).

In May 2003, noting that Petitioner's brief on the merits had not been filed despite the grant of an extension for such filing (Doc. 45), the Court announced its intention to rule on the petition as submitted (Doc. 46); however, upon attorney Dunn's request, the Court delayed its ruling. On August 15, 2003, having received no brief, the Court announced that it would rule on the petition as submitted (Doc. 47).

On September 22, 2003, Petitioner filed a motion to hold this proceeding in abeyance pending resolution of further state court proceedings which Petitioner stated he intended to file in the near future (Doc, 48; see also Doc. 49). In the alternative, Petitioner renewed his motion for evidentiary hearing in this Court (Doc. 48; see also Doc. 49). On February 29, 2004, the Court conducted a status conference at which Mr. Dunn indicated that he had not yet filed the state

court proceeding but stated that he planned to file such proceeding within a matter of weeks. On April 14, 2004, the Court denied Petitioner's motion to hold proceedings in abeyance and denied his alternative renewed motion for evidentiary hearing (Doc. 50).

Having considered the parties' arguments, the state courts' decisions, applicable federal and state law, and the record in this case, the Court, pursuant to the discussion hereinbelow, DENIES Petitioner's petition for writ of habeas corpus.

II. Federal Habeas Claims

A. Claim One - erroneous denial of motion to change venue

1. Substance and background of claim

In Claim One, Petitioner asserts that the trial court's denial of his motion for a change of venue deprived him of his right to a fair and impartial jury at his trial and resulted in tainted proceedings, thereby denying him the fair trial and sentencing proceedings guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Petitioner contends that the pervasive nature of the pre-trial publicity rendered a fair trial in Chatham County impossible. Petitioner notes that 71 of the 84 jurors questioned during voir dire indicated either that they had heard about his case via pre-trial publicity and/or that they had discussed the case with others. Of that number, 32 potential jurors were excused for cause because of their strong feelings regarding Petitioner's guilt or because they had pre-determined the appropriate sentence. Petitioner notes that only one potential juror who was questioned about pretrial publicity indicated that he did not know anything about the case, and that juror stated that he had been living outside of Savannah prior to the trial.

The issues presented in Claim One having been rejected on direct appeal to the Georgia Supreme Court, see Davis v. State, 263 Ga. at 7(5), the state habeas court found those issues barred from reconsideration pursuant to principles of res judicata, State Habeas Order at 29,[2] thereby denying Petitioner habeas relief as to the substance of Claim One.

2. Discussion

On Petitioner's direct appeal of his conviction and sentence, the Georgia Supreme Court ruled adversely to Petitioner as to the issues now presented in Claim One, and the state habeas court denied habeas relief on the basis of res judicata. Thus, Petitioner must show that the Georgia Supreme Court's decision either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d).

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[2] The state habeas court set out the state law regarding the procedural bar of issues that have been previously raised and litigated:

> Georgia law is well settled that, "[a]fter an appellate review the same issues will not be reviewed on habeas corpus." Elrod v. Ault, 231 Ga. 750, 750 (1974) (citations omitted). An issue which has been "actually litigated, i.e., raised and decided, in the appellant's direct appeal" cannot be reasserted in habeas corpus proceedings. Gunter v. Hickman, 256 Ga. 315, 316 (1) (1986) (citation omitted). Accordingly, under the law of the case doctrine, this court has no authority to revisit on habeas corpus review any issue already addressed by the Georgia Supreme Court on Davis's direct appeal. Roulain v. Martin, 266 Ga. 353, 353-54 (1) (1996). Any claim of error or violation of Davis's rights decided adversely to him on direct appeal is barred at this stage, and habeas corpus relief must be denied as to each such claim of error or constitutional violation.

State Habeas Order at 4-5.

The Georgia Supreme Court's factual findings underlying its decision are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

The Georgia Supreme Court made the following findings and conclusions concerning the issues raised in Claim One:

> Only 20 percent of the prospective jurors were excused for bias or prejudice arising from their knowledge of the case or of people involved in the case. The defendant has shown neither actual prejudice in the jury selection process nor the kind of extensive and inflammatory publicity that mandated a change of venue in our recent case of Tyree v. State, 262 Ga. 395, 418 S.E.2d 16 (1992). There was no error in the denial of the defendant's motion for change of venue.

Davis v. State, 263 Ga. at 7 (5).

Lacking clear and convincing evidence in rebuttal of the presumed correctness of the above findings, this Court finds that the Georgia Supreme Court's decision was not based on an unreasonable determination of the facts in light of the evidence presented on appeal, or that the Georgia Supreme Court unreasonably applied or contradicted established federal law in arriving at its decision. Therefore, Petitioner is afforded no habeas relief through Claim One.

B. Claim Two -- racially discriminatory jury strikes

1. Substance and background of claim

In Claim Two, Petitioner alleges that during jury selection at his trial, the prosecution exercised its peremptory strikes in a racially discriminatory manner when it used a disproportionate number of its strikes against black persons and provided non race-neutral reasons for the strikes in

violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The state habeas court declined to address the jury-strike issue after finding that it had been effectively raised and litigated at motion for new trial and on direct appeal and thus barred from reconsideration in the state habeas proceeding pursuant to principles of claim or issue preclusion. State Habeas Order at 15, 30; see also supra note 2 (stating applicable Georgia law considered by state habeas court).

2. Discussion

Because the Georgia Supreme Court's adverse ruling regarding the jury-strike issue underlies the state habeas court's denial of habeas relief as to the substance of Claim Two, Petitioner must show that the Georgia Supreme Court's decision either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" See 28 U.S.C. § 2254 (d). The factual findings underlying the Georgia Supreme Court's decision as to this claim are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal, id. § 2254 (e)(1).

The Equal Protection Clause of the Fourteenth Amendment prohibits the exercise of peremptory jury-selection strikes on the basis of race. Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69 (1986). Batson requires a defendant asserting racial bias in making jury selections to make a prima facie case that the prosecutor purposefully discriminated on the basis of race in exercising strikes of jurors, after which the burden shifts to the prosecutor to rebut the inference with racially neutral explanations for the challenges. Id. at 96-97. Whether the prosecutor's explanation is sufficient to cancel the inference of discrimination is a determination to be made by the trial

court, id. at 98, and the trial court's factual determinations are entitled to "great deference" on appeal, id. at 98 n.21.

On appeal of Petitioner's conviction and sentence, the Georgia Supreme Court found that "the prosecutor offered the kind of 'concrete, tangible, race-neutral and neutrally-applied reasons' that are sufficient to rebut a prima facie case under Batson," Davis v. State, 263 Ga. at 8, and concluded that "[t]he record supports the trial court's determination that the state successfully rebutted the prima facie case," id. at 9. The court explained:

> The prosecutor explained that he struck five of the eight because of their clear reluctance to impose a death sentence. . . . A prospective juror's conscientious aversion to the imposition of a death sentence is an adequate reason to justify a peremptory strike in a death-penalty case. . . .
>
> . . . . [T]he answers of these five prospective jurors amply support the prosecutor's suspicions about their willingness to impose a death sentence.
>
> Another juror was struck because he testified the defendant "lived out in the area where some of my relatives live" and because he referred to the defendant by his first name even though he denied knowing him personally. . . . A reasonable suspicion about a prospective juror's impartiality that falls short of justifying an excusal for cause might well justify the exercise of a peremptory strike.
>
> The trial court was authorized to conclude that such is the case here...[T]he prosecutor's suspicions were not unreasonable.

> A seventh juror was struck because he testified he used to work with the defendant's mother and aunt, and he admitted that knowing them would affect his "ability to reach a fair decision in the case." The last juror was struck because the police came to her house to arrest her son for burglary and because her daughter "got into a rash of shoplifting" and was receiving psychiatric treatment for her problem. The prosecutor had legitimate, neutral and non-racial reasons to strike these two jurors.

Id. at 8-9 (internal punctuation and citations omitted).

Lacking clear and convincing evidence in rebuttal of the above findings, this Court finds that the Georgia Supreme Court's decision as to Claim Two was not based on an unreasonable determination of the facts in light of the evidence presented on appeal. This Court further finds that the decision is not contrary to or an unreasonable application of the standards established in Batson and its progeny. Accordingly, Petitioner is not entitled to habeas relief through Claim Two.

C. Claim Three - erroneous rulings by the trial court

1. Substance and background of claim

In Claim Three, Petitioner asserts that the trial court repeatedly overruled proper objections made by the defense counsel, thereby denying him a fair trial, due process, equal protection, and effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner asserts that the following rulings were erroneous: *(1)* denial of Petitioner's motions to sever Counts III and IV of the indictment; *(2)* denial of defense motions for mistrial based on discovery violations relating to witness Dorothy Ferrell; *(3)* denial of Petitioner's motions for directed verdict on the

obstruction charge and on the aggravated assault on Michael Cooper; and *(4)* denial of Petitioner's motion for new trial.

The state habeas court declined to address the erroneous trial rulings claim after finding it to have "already been reviewed on appeal and decided adversely" to Petitioner. State Habeas Order at 31; see also supra note 2 (stating applicable Georgia law considered by state habeas court).

2. Discussion

a. Threshold matter: no procedural default issue as to Claim Three

Respondent, while conceding that the majority of Claim Three is properly before the Court, contends that "the related issue of whether trial counsel was ineffective in failing to adequately support the defense motions which alleged[ly] resulted in improper rulings by the trial court" was found to have been procedurally defaulted in the state habeas court. The procedural default assertion appears to have been prompted by the following language in the State Habeas Order addressing state "Claim III" (equivalent to federal "Claim Three"):

> [T]he issue of counsel's performance at trial in failing to make an adequate showing to support defense motions is barred as having been litigated in the motion for new trial and on appeal, or in the alternative has been waived by not being raised and litigated at the first available opportunity . . . .

Id.

Inasmuch as Claim Three concerns erroneous trial court rulings rather than ineffective assistance of counsel, and as the parties agree that the substantive issues set out in Claim Three have not been procedurally defaulted in the state courts,

this Court need not address any alleged ineffective assistance related to Claim Three.

b. Merits of claim

Because the Georgia Supreme Court's adverse ruling as to the issues raised in Claim Three underlies the state habeas court's denial of habeas relief as those issues, Petitioner must show that the Georgia Supreme Court's decision either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d). The factual findings underlying the Georgia Supreme Court's decision as to the substance of Claims Three are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal, id. § 2254 (e)(1).

The challenges presented in Claim Three are addressed below.

1) Denial of motion to sever

The Georgia Supreme Court found no ground for reversing Petitioner's conviction and sentence on the basis of the trial court's denial of the defense motion for severance. Davis v. State, 263 Ga. at 6 (3). The court explained:

> A denial of severance is reviewed under an abuse of discretion standard. Offenses may be tried together when they are based on the same conduct or constitute a series of acts connected together (or when they constitute part of a single scheme or plan).
>
> Here, all the offenses are connected: they occurred the same evening; the same gun was involved; the second assault was the reason the

> victim tried to arrest the defendant; and there was some evidence that one reason he shot the officer was because he was afraid he had been seen in the area where the first assault had occurred. The denial of severance was not an abuse of discretion,

Id. (internal citations omitted).

Petitioner has not presented clear and convincing evidence in rebuttal of the presumed correctness of those findings. This Court finds that the Georgia Supreme Court's decision as to severance was not based on an unreasonable determination of the facts in light of the evidence presented on appeal and that the Georgia Supreme Court did not unreasonably apply or contradict established federal law in arriving at its decision. Therefore, Petitioner is afforded no habeas relief through this subclaim.

2) Denial of motions for mistrial and denial of motion for new trial as related to Dorothy Ferrell's testimony

The facts underlying these subclaims follow. Dorothy Ferrell, an eyewitness at Petitioner's trial, identified Petitioner as Officer McPhail's killer. After the close of evidence in the guilt/innocence phase of Petitioner's trial, defense counsel's wife received a phone call from an individual identifying herself as Ferrell and stating that she had lied on the witness stand. See Trial Tr. 1476-77. The State then revealed to defense counsel that Ferrell had written a letter to the District Attorney requesting favorable treatment in her own legal troubles, stating "I promise you will not be making a mistake." Trial Tr. 1477-79, 1483. The District Attorney had replied to her that he was without authority and ability to help her but that he appreciated her coming forward to help bring Petitioner to justice. Trial Tr. 1479, 1484.

Ferrell was brought before the trial court for questioning outside the presence of the jury, at which time she denied making the phone call to defense counsel's home, Trial Tr. 1481-82. She admitted, however, that she had written the letter to the District Attorney and that when she testified at the Petitioner's preliminary hearing prior to writing the letter, she had felt that the District attorney was in a position to help her, Trial Tr. 1482-83, 1485.

The trial judge offered to allow the defense to recall Ferrell to question her in the presence of the jury. Trial Tr. 1494; Mot. New Trial Hr'g Tr. 40. Defense counsel declined to recall Ferrell but moved instead for a mistrial on the ground that the State had failed to timely provide the defense team with the information regarding Ferrell's letter to the District Attorney. Trial Tr. at 1493-94. The defense subsequently moved for a new trial asserting the same basis. The trial court ultimately denied both motions.

The defense raised the trial court's denial of those motions on appeal of Petitioner's conviction and sentence. Although the Georgia Supreme Court did not expressly address the trial court's denial of the motion for mistrial, it is clear that Ferrell's assurances that her testimony had been truthful, together with the defense counsel's decision not to re-open the evidence to bring Ferrell's letter to the jury's attention, see Claim Four discussion, infra, amounted to a sufficient basis for the trial court's denial of the motions for mistrial and for new trial.

Petitioner has not shown that the Georgia Supreme Court's decision not to overturn Petitioner's conviction and sentence on the basis of the trial court's denial of either of the motions at issue involved an unreasonable determination of the facts in light of the evidence presented on appeal. The Court also finds that the Georgia Supreme Court did not unreasonably apply or contradict established federal law in arriving at its decision. Accordingly, Petitioner is afforded no habeas relief through these subclaims.

3) Denial of motions for directed verdict and motions for new trial, and overruling of other defense motions at trial

Petitioner raised the trial court's denial of motions for directed verdict as error in his direct appeal of his conviction and sentence, and Petitioner's motions for new trial were based upon grounds of ineffective assistance of counsel and errors made by the trial court during the proceedings. The state habeas court found these subclaims to have been barred from habeas consideration because of principles of res judicata or waiver. See State Habeas Order at 31; see also supra note 2 (stating applicable Georgia law considered by state habeas court). The underlying attorney actions and trial court rulings were part of the record before the Georgia Supreme Court.

Petitioner has not shown that the Georgia Supreme Court's affirmance of Petitioner's conviction and death sentence in the face of errors asserted on appeal resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented on appeal. In addition, Petitioner has not shown cause for default of any issues that were not raised on appeal. Thus, habeas relief is not afforded pursuant to these subclaims.

D. Claim Four -State misconduct

In Claim Four, Petitioner asserts that, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, *(1)* the State withheld material exculpatory evidence, *(2)* the prosecution presented false testimony at trial, and *(3)* law enforcement investigation of the case involved improper pressure on eyewitnesses and other witnesses, which resulted in unreliable identifications and testimony.

1. Withholding of exculpatory information

a. Substance and background of subclaim

Petitioner alleges that, despite timely requests by trial counsel pursuant to Brad v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the State failed to disclose material and exculpatory information concerning key trial eyewitness Dorothy Ferrell. The nondisclosed information was that Ferrell had contacted the District Attorney's office in 1990 about the possibility of a favorable disposition in an impending criminal action against her in exchange for her testimony in Petitioner's case. Petitioner asserts that this omission amounts to suppression of material exculpatory information.

Petitioner alleges that as a result of the State's failure to provide the exculpatory information, he was harmed by Ferrell's false testimony at trial in that the prosecution's use of her testimony played an important part in the State's success in obtaining a guilty verdict. In support of this allegation of harm, Petitioner submits Ferrell's sworn affidavit in which she states that she lied at trial when she testified that she witnessed Officer McPhail's murder and that Petitioner was the shooter.

The state habeas court found that the portion of Claim Four relating to Dorothy Ferrell had been litigated on direct appeal, thereby implying that the state habeas court declined to address that subclaim on principles of res judicata. See State Habeas Order at 31-32; Resp.'s Ans. at 18-19.

b. Discussion

Because the Georgia Supreme Court's adverse ruling as to the State's suppression of Ferrell's letter underlies the state habeas court's denial of habeas relief as to that issue, Petitioner must show that the Georgia Supreme Court's decision either was based on "an unreasonable determination

of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d). The factual findings underlying the Georgia Supreme Court's decision as to this subclaim are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal, id. § 2254 (e)(1).

Regarding the issue of the State's nondisclosure of Ferrell's letter, the Georgia Supreme Court stated:

> The state is under a duty to reveal any understanding or agreement with a witness concerning criminal charges pending against that witness. In this case, there was no suppression of any understanding or agreement for prosecutorial leniency and no grounds for reversal.

Davis v. State, 263 Ga. at 9 (11) (internal punctuation and citations omitted). Thus, the Georgia Supreme Court based its refusal to reverse Petitioner's conviction and sentence as to this issue on Petitioner's failure to show that the State had breached a cognizable duty to Petitioner.

In the absence of clear and convincing evidence to the contrary, this Court accepts as correct the factual finding that "there was no suppression of any understanding or agreement for prosecutorial leniency," id. However, the Georgia Supreme Court's denial of habeas relief as to this subclaim solely on that basis, while relevant to Petitioner's Brady claim, is not conclusive. Thus, further inquiry is necessary into whether the Georgia Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d).

"Impeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule." See United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985) ("The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination."). Where the government fails "to assist the defense by disclosing information that might have been helpful in conducting the cross-examination" of a witness, and where such nondisclosure deprives the defendant of a fair trial, the failure to disclose such evidence amounts to a constitutional violation. Id. at 678. "Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." Giglio v. United States, 405 U.S.150,154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). Accordingly, this Court must determine whether the State was under an affirmative duty to produce Ferrell's letter pursuant to Brady and to determine whether Petitioner was denied a fair trial as a result of the State's failure to produce the letter.

Assuming, arguendo, that the State was under such obligation, the circumstances reveal that due process was not violated. The failure to provide evidence favorable to an accused upon request violates due process only where the evidence is "material to guilt or to punishment." Brady, 373 U.S. at 87 (emphasis added). "[I]mplicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." Bagley, 473 U.S. at 674-75 (internal punctuation and citation omitted).

The key to the materiality question is defense counsel's explanation as to why the defense team decided not to recall Ferrell after the evidence had been closed at the guilt-innocence phase of the trial:

> We felt . . . that bringing [Ferrell] back before the jury would not help our case . . . *we weren't going to get very far with this witness, simply*

> *because we had fairly impeached her on the issue of shoplifting.* I think we had introduced some three, four, or five shoplifting convictions; therefore, the fact that she was seeking help on another charge, we don't think it would have influenced the jury's consideration of her credibility even more than they had already been influenced by the convictions that we had introduced. . . . [W]e moved for a mistrial on the ground that if we had had that information [i.e., the letter that she wrote to the District Attorney or the fact of the letter's existence], we could have put it in the orderly cross-examination of the witness as she appeared and not calling her after the close of the evidence, and *we felt somewhat that if we had recalled her- the Court allowed us to open up the case she wouldn't give ins the answer we wanted, the jury would think it's some sort of twelfth hour desperation move on our part. Me were frankly afraid to do that, so we moved for a mistrial . . .*
>
> .

Mot. New Trial Hr'g Tr. 40-41 (emphases and internal punctuation added).

The State's "failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination . . . . amounts to a constitutional violation only if it deprives the defendant of a fair trial." Bagley, 473 U.S. at 678. Taking into account defense counsel's explanation that the defense team felt that it had already impeached Ferrell's credibility, and additionally considering that the defense team made a strategic decision not to re-open the evidence to further impeach Ferrell regarding her motives for testifying, the Court finds that Petitioner has not shown that the outcome of the trial would have been different had the State earlier revealed the letter to the defense team. Thus,

the nondisclosure of the Ferrell letter does not undermine confidence in the outcome of the trial. Accordingly, this subclaim does not justify a grant of habeas relief.

2. Offering false testimony

a. Substance and background of subclaim

Petitioner alleges that prosecution witness Kevin McQueen's testimony was false and that the prosecution exacerbated the effect of the false testimony by arguing in closing that "there is not a reason on earth to doubt [McQueen's] word," Trial Tr. 1501, when in fact there was "every reason" to doubt his word. In support of these allegations, Petitioner submits McQueen's sworn affidavit in which McQueen states that he "made up the story about the confession" because he was angry with Petitioner at the time and that he repeated the false story at trial because he was afraid of being charged with perjury and returned to jail if he changed his story when testifying at the trial. Aff. of Kevin McQueen 5 (Dec. 5, 1996).

Because Petitioner failed to raise a Brady claim regarding McQueen's testimony on appeal, the state habeas court rejected this subclaim as having been procedurally defaulted. See State Habeas Order at 32; State habeas hr'g Tr. 90.

b. Discussion

The independent and adequate state-law basis for the procedural bar based on waiver is Black v. Hardin, 255 Ga. 239, 239-40, 336 S.E.2d 754, 754-55 (1985). In Black, the Georgia Supreme Court, construing O.C.G.A. § 9-14-42, held in pertinent part:

> The habeas corpus statute . . . limit[s] the relief available by habeas corpus to errors or deficiencies which constitute 'a substantial denial of . . . rights under the Constitution of the United States or of this state.' . . . [A] failure to

> make timely objection to an error or deficiency in the trial court constituted a waiver for purposes of habeas corpus review, absent the statutory exceptions of cause and prejudice shown, or a miscarriage of justice. . . .
>
> . . . [A] failure to make timely objection to any alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus. However, an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for failure to object or to pursue on appeal and a showing of actual prejudice to the accused. Even absent such a showing of cause and prejudice, the relief of the writ will remain available to avoid a miscarriage of justice where there has been a substantial denial of constitutional rights.

Black, 255 Ga. at 239-40.

Here, Petitioner has not shown that he was prejudiced by McQueen's false testimony. Another witness testified at trial that Petitioner had confessed to killing Officer McPhail. See supra note 1 (setting out Georgia Supreme Court's factual summary). Thus, even without McQueen's testimony, the jury would have heard evidence of his confession to another individual.

Moreover, even if Petitioner had been prejudiced by McQueen's false testimony to some degree, it is evident that Petitioner cannot prevail on the merits of this subclaim because McQueen's affidavit fails to provide evidence of State misconduct. The applicable standard is that the State may not engage in "deliberate deception of a court and jurors by the presentation of known false evidence," Giglio, 405 U.S. at 153. A showing of state misconduct requires, at

minimum, an allegation that the State presented McQueen's testimony while knowing it was false. McQueen's affidavit, accepted as truthful for the sake of argument, shows only that McQueen, on his own and prompted by no one else, sought to take out his anger against Petitioner by lying to a jail warden, by making a false statement to a police officer, and by lying to the court and the jury when he testified that Petitioner confessed to shooting Officer McPhail. McQueen did not present the affidavit recanting his testimony until well after the trial had ended, and no evidence has been presented to indicate that the State knew that his trial testimony was false.

Recanted testimony presented to show "actual innocence" cannot, of itself, serve as a basis for federal habeas corpus relief. See Schlup v. Delo, 513 U.S. 298, 315,115 S. Ct. 851, 861, 130 L. Ed. 2d 808 (1995). Rather, the appropriate inquiry is whether constitutional impropriety existed. See id. In that McQueen volunteered the allegedly false information to the warden, to the police, and to the court, and in that he was under no State compulsion to testify, Petitioner's allegations regarding McQueen's false testimony fail to state a claim under Brady. Therefore, habeas relief may not be granted on the basis of this subclaim.

3. Improper pressure on witnesses

a. Substance and background of subclaim

Petitioner alleges that law enforcement officers pressured witnesses to make statements and/or to identify Petitioner as the shooter. Petitioner asserts that mistaken identifications led to his conviction and sentence and argues that there was substantial conflict in the evidence adduced at trial regarding the identity, description, attire, and physical characteristics of the two individuals involved in the assault of Larry Young and murder of Officer McPhail. He alleges that improper pressure on witnesses by law enforcement personnel amounted to unreasonably suggestive techniques which in

turn resulted in unreliable identifications of Petitioner as Officer McPhail's murderer.

In support of this subclaim, Petitioner presents several affidavits, including four affidavits submitted for the first time in this federal habeas proceeding, see Aff. of Antoine Williams (Oct. 12, 2002); Aff. of Larry Young (Oct. 11, 2002); Aff. of Darryl ("D.D") Collins (July 11, 2002); Aff. of Monty Holmes (Aug. 17, 2001).

Respondent contends that this subclaim has been procedurally defaulted.

b. Discussion

The state habeas court's denial of habeas relief as to alleged law enforcement pressure was based solely upon the court's finding of procedural default, and Petitioner has shown no cause for failing to timely raise that subclaim. The standard for "waiver" in the state court, see Black, 255 Ga. at 239-40, is an independent and adequate state ground for a finding of procedural default in the federal court. Likewise, the Georgia standard for overriding a procedural bar where cause and prejudice are shown is equivalent to the federal standard; thus, the state habeas court's finding of procedural default results in denial of habeas relief on the claim at issue in this Court, provided that this Court is convinced that no constitutional impropriety has occurred so as to risk a miscarriage of justice.

A federal court looks, under the "miscarriage of justice" exception, to colorable claims of actual innocence for permission to address questions of constitutional impropriety asserted in procedurally defaulted claims. See Schlup, 513 U.S. at 315-16 ("[1]f a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and

argue the merits of his underlying claims"); see also Brown v. Singletary, 229 F. Supp. 2d 1345, 1362 (S.D. Fla. 2002) (explaining that procedural claims for actual innocence "are not the 'I didn't do it, set me free' claims, but rather, they are the 'I didn't do it, therefore it would be a fundamental miscarriage of justice if you could not hear about the constitutional errors at my trial' claims"). If a federal court is satisfied that no constitutional error occurred, the "actual innocence" gateway need not be accessed, See Schlup, 513 U.S. at 316.

This claim has been procedurally defaulted, and Petitioner has failed to show cause for the default. Furthermore, the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim. Therefore, no habeas relief is afforded Petitioner through this subclaim.

4. Harm: lack of opportunity to prove that Sylvester Coles was triggerman

a. Substance and background of argument

Petitioner asserts that this is a case of mistaken identity--that Petitioner admits having been present at the scene but denies shooting Officer McPhail, and that there is substantial conflict in the evidence adduced at trial regarding the identity, description, attire and physical characteristics of the two individuals involved in the incident leading to the assault of Larry Young and the murder of Officer McPhail. Petitioner contends that the improper conduct of State agents, in combination with the ineffective assistance of counsel, led to Petitioner's misidentification and the resulting capital conviction and death sentence.

b. Discussion

The state habeas court construed the purpose of this argument as an attempt to show that Petitioner is actually innocent by clearing up the mistaken identity with affidavit evidence not available at the time of the trial. The court found that because evidence was before the jury portraying Sylvester "Red" Coles as the perpetrator, the jury's decision reflected that there was no mistaken identity and that a habeas court has no right to supplant the jury's role by finding otherwise. The court stated:

> [I]n connection with Claim IV [state equivalent of federal Claim Four], regarding an alleged lack of exculpatory evidence, Davis discussed in detail many items of substantive and impeachment evidence which allegedly would undermine the testimony of witnesses who identified Davis as the person who fired the shots that killed Officer McPhail, e.g., by showing that witness Sylvester "Red" Coles, rather than Davis, was the shooter. Although the failure to discover, admit or effectively argue the importance of these items of evidence would appear to place this case in the category of a case of "mistaken identity," the court finds from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during Davis' trial. The jury, in its rightful role as finder of fact during the trial, was responsible for evaluating the credibility of the witnesses and determining whether the state proved beyond a reasonable doubt that Davis shot and killed Officer McPhail.

State Habeas Order at 41.

Petitioner has not shown that these findings and conclusions are unreasonable or contrary to established federal law. Thus, no habeas relief is available through this subclaim.

E. Claim Five -- attorney conflict of interest

1. Substance and background of claim

In Claim Five, Petitioner asserts that the trial court forced his attorneys into a conflict of interest during post-trial proceedings in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and that as a result, Petitioner's right to assistance of counsel was compromised and he was denied a fair adversarial testing of his conviction and sentence.

The issue arose as follows. During post-trial proceedings and on appeal, Petitioner had two sets of attorneys: Petitioners' trial counsel, who were appointed by the trial court to serve as appellate counsel ("trial/appellate counsel"), and an independent attorney ("ineffectiveness counsel"), who was appointed sua sponte by the trial court to raise and prosecute any issues of ineffectiveness of trial counsel. Petitioner alleges that the trial court's appointment of two sets of appellate counsel to represent him simultaneously at the motion for new trial and on direct appeal hampered the potential effectiveness of both trial/appellate counsel and ineffectiveness counsel by creating intractable conflicts and ethical dilemmas. Petitioner alleges that as a result of the dual appointment, trial/appellate counsel, ineffectiveness counsel, and Petitioner all had inherent conflicts of interest.

The state habeas court concluded that the dual appointment did not prejudice Petitioner and denied habeas relief as to the substance of Claim Five. State Habeas Order at 25-28. The Georgia Supreme Court affirmed. Davis v. Turpin, 273 Ga. at 248.

2. Discussion

The significance of Petitioner's conflict of interest claim is that if Petitioner is successful, he need not establish prejudice in pressing his ineffective assistance claim (Claim Six). Generally, prejudice must be shown in order to prevail on an ineffective assistance of counsel claim, Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); however, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief," Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct.1708,1719, 64 L. Ed. 2d 333 (1980). Petitioner argues that because the trial court created a conflict of interest by making the dual appointment, Petitioner need not establish prejudice in his ineffectiveness claim.

This Court notes that while the state habeas court described the dual appointment as "the awkward position of the primary defense team in carrying the appeal forward while answering charges of ineffective assistance," State Habeas Order at 26, the state habeas court specifically found that the ineffectiveness claim had no adverse effect on the performance of Petitioner's trial/appellate counsel, id. at 27. In affirming the denial of state habeas relief, the Georgia Supreme Court likewise found that none of Petitioner's counsel had in fact operated under a conflict of interest. See Davis v. Turpin, 273 Ga. at 246-49.

Petitioner must show that the Georgia Supreme Court's decision either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254 (d). The Georgia Supreme Court's factual findings underlying its decision are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

"An actual conflict occurs when a lawyer has inconsistent interests." Freund v. Butterworth,165 F.3d 839,859 (11th Cir.1999). The Georgia Supreme Court, addressing the possibility of a conflict of interest in ineffectiveness counsel and/or appellate counsel in this case, stated:

> Because nothing in the trial court or habeas court records suggests that Davis's supplemental appellate counsel had divided loyalties or allowed his actions to be in any way negatively affected by the simultaneous representation, we conclude that the habeas court did not err in finding that Davis's new counsel was not operating under an actual conflict of interest.
>
> Davis also contends that his original trial counsel began operating under a conflict of interest once new counsel was appointed to pursue ineffective assistance claims. Again, we conclude that he has failed to show that an actual conflict of interest existed. . . . Nothing in the record suggests that Davis's original counsel withheld his best efforts or was distracted because his professional reputation was subjected to scrutiny. The record shows that Davis's counsel encouraged Davis to speak freely and confidentially with his new counsel about any concerns Davis might have had concerning his representation at trial and even suggested several possible areas for examination to Davis's new counsel. Accordingly, we accept the habeas court's factual finding that Davis's original counsel continued to serve Davis's interests and took active steps to facilitate the efforts of Davis's new counsel to do the same.

Davis v. Turpin, 273 Ga. at 248.

Petitioner has neither produced clear and convincing evidence to cancel the presumption of correctness afforded the factual findings of the Georgia Supreme Court nor shown that the Georgia Supreme Court's decision involved an unreasonable determination of the facts in light of the evidence presented on appeal of denial of habeas relief or that the court unreasonably applied established federal law. Indeed, Petitioner's conflict argument is totally speculative. Because "speculative or merely hypothetical conflict" is not sufficient to establish a Sixth Amendment violation, Brownlee v. Haley, 306 F.3d 1043,1064 (11th Cir. 2002), no habeas corpus relief is warranted on the basis of Claim Five.

F. Claim Six - ineffective assistance of counsel

a. Substance and background of claim

In Claim Six, Petitioner asserts that he %vas denied constitutionally effective assistance of counsel at trial, at motion for new trial, and on direct appeal in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. He alleges that, in combination with the State's alleged withholding of material evidence, denial of effective assistance prevented the jury from hearing compelling exculpatory evidence, thereby depriving Petitioner of a fair trial and capital sentencing proceedings.

The state habeas court denied habeas relief as to claims of ineffectiveness of trial counsel on grounds of res judicata and procedural default. The court found "as a matter of law that the sufficiency of the performance of the primary defense team *at trial* ha[d] been reviewed and [was] procedurally barred" by operation of rules of res judicata. State Habeas Order at 8. The court also found that "to the extent issues regarding the performance of the primary defense team during the penalty phase were not raised in the motion for new trial and on appeal, those issues have been waived by not being raised and litigated at the first available opportunity." Id. at

33. Lastly, the court rejected the alleged ineffectiveness of appellate counsel and of ineffectiveness counsel as possible "cause" excusing the procedural bar of any trial-counsel ineffectiveness claims that were not timely raised. Id. As a result of those findings, the state habeas court denied habeas relief as to the substance of Claim Six. *Id.* The Georgia Supreme Court affirmed that denial. Davis v. Turpin, 273 Ga. at 249.

2. Discussion

The state habeas court relied on adequate and independent state law bases in declining to address the allegations of trial counsel's ineffectiveness at trial. See supra note 2 (stating applicable Georgia law regarding previously raised and litigated issues considered by state habeas court); Black, 255 Ga. at 239-4Q (stating applicable Georgia law of "waiver"). This Court is called upon to determine whether either the Georgia Supreme Court's determination that trial counsel were not ineffective and the state habeas court's determination that appellate and ineffectiveness counsel were not ineffective were based on "unreasonable determination [s] of the facts in light of the evidence presented in the state court proceeding[s]," or were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254 (d). Any factual findings underlying those courts' determinations are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

This Court first sets out the established federal standards regarding ineffectiveness of counsel, then examines the decisions rendered by the state courts regarding the issues at issue to ascertain whether federal standards were appropriately applied.

a. Federal ineffectiveness standards

The Supreme Court requires examinations of ineffective assistance claims to proceed in two steps: establishment of deficient performance and a showing of prejudice to the defense.

A habeas petitioner seeking to prove ineffectiveness assistance must first establish that his counsel's performance was deficient. Strickland, 466 U.S. at 687. A showing of deficient performance requires a "substantial showing" that Petitioner's "counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed . . . by the Sixth Amendment." Id. at 687. "[I]n order to prove deficient performance, [Petitioner] must establish that no competent counsel would have taken the action that his counsel did take." Brownlee, 306 F.3d at 1059 (internal quotations omitted). "Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689.

If deficient performance is shown, Petitioner "must then demonstrate that `the deficient performance prejudiced the defense,' which `requires showing that counsel's errors were so serious as to deprive [Petitioner] of a fair trial, a trial whose result is reliable,' " Brownlee, 306 F.3d at 1059 (quoting Strickland, 466 U.S. at 687).

"There are exceptions to the requirement . . . that prejudice be shown in order to prevail on an ineffective assistance of counsel claim." Koste v. Dormire, 345 F.3d 974, 980. For example, the Supreme Court has spared the defendant the need of showing probable effect upon the outcome where the defendant's attorney actively represented conflicting interests. A petitioner

> must "affirmatively prove prejudice" by showing that counsel's errors "actually had an adverse effect on the defense" This requires a showing of more than "some conceivable effect on the outcome of the proceeding" Instead, the

> petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Although this standard is difficult to meet, it is significant that a petitioner must show only a reasonable probability that the outcome would have been different; he "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." When evaluating this probability, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."

Brownlee, 306 F.3d at 1059 (quoting Strickland, 466 U.S. at 693-95).

b. Issues decided on appeal

In determining that trial counsel were not ineffective, the Georgia Supreme Court stated:

> Davis contends his trial counsel was ineffective for failing to object to certain evidence and charges, for not requesting certain jury charges, and for not recalling a witness for additional cross-examination. The record supports the trial court's determination that Davis has shown neither deficient attorney performance nor actual prejudice and, therefore, has failed to show he was denied effective assistance of counsel.

Davis v. State, 263 Ga. at 10 (17).

This Court finds that the above conclusion was not based on an unreasonable determination of the facts in light of the evidence presented on appeal or that the finding was contrary

to or unreasonably applied established federal law. In making this finding, this Court notes in particular that "[j]udicial scrutiny of counsel's performance must be highly deferential," that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight," and that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Pursuant to the above, no habeas relief is afforded Petitioner through the subclaims of Claim Six that were raised and rejected on appeal to the Georgia Supreme Court.

c. Procedurally defaulted claims

Any issues of trial counsel's ineffectiveness that were not raised at motion for new trial and on appeal have been procedurally defaulted. Those issues include *(1)* the defense's failure to present available evidence to counter evidence connecting the bullets retrieved from Cooper to those from the scene of Officer McPhail's shooting, *(2)* the defense's failure to investigate, discover, and present evidence showing that Sylvester Coles was Officer McPhail's killer and that Petitioner could not have been the killer, *(3)* the defense's failure to present evidence discrediting the false testimony of witnesses at trial, and *(4)* the defense's failure to file several motions to protect Petitioner's right to a fair trial and to support the pre-trial motions that were filed.

In his state habeas petition, Petitioner asserted ineffectiveness counsel's and appellate counsel's ineffectiveness at motion for new trial and on appeal as "cause" excusing his procedural default of the above claims regarding ineffectiveness of trial counsel at trial. Finding that the issue of "cause" was properly before the court, State Habeas Order at 9, the state habeas court addressed those issues on their merits after acknowledging that

> the procedure followed by the trial court, in sua sponte appointing separate counsel to pursue the ineffectiveness of counsel claim within the time constraints of the motion for new trial and subsequent appeal, put attorney Burch in an awkward position and likely significantly hindered his ability to assert claims on appeal relating to the effectiveness of trial counsel at the motion for new trial stage.

Id. at S.

1) Post-conviction performance of trial/appellate counsel

With respect to trial/appellate counsel's post-conviction performance at motion for new trial and on appeal, the state habeas court found that counsel "did not fail to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process" in the motion for new trial proceedings," State Habeas Order at 14, and concluded that "in the totality of this case Davis has not overcome the strong presumption that his attorneys . . . . rendered adequate assistance at the motion for new trial and on appeal and has not shown that his counsel's performance was deficient or that the alleged deficient performance prejudiced his defense to the extent that Davis was thereby denied a trial whose result is reliable," id. at 20. The court's findings and conclusions justifying that result were as follows:

> As to Claim II, the court finds that counsel effectively raised and litigated the issue of the state's strikes against black jurors on motion for new trial and on appeal. . . .
>
> [As to] Claim III, ... counsel effectively raised and litigated many of these issues [of trial court error] . . . by setting out the applicable legal standards, discussing the relevant facts,

and arguing cogently that the trial court erred in denying Davis' motions. . . .

As to Claim IV, . . . [t]he court notes that appellate counsel did brief the issue of the trial court's denial of Davis' motion for mistrial relating to witness Dorothy Farrell.. . . The court further finds that Davis failed to establish that counsels' failure to interview jurors after trial and before the motion for new trial fell outside the wide range of reasonable professional representation. . . .

In Claim VIII, ... [a]s to the preliminary hearing. . . . the primary defense team deliberately kept Davis out of the courtroom for valid strategic reasons . . . . Counsel advised Davis of his right to be present and discussed the strategic reasons for his being absent and obtained a signed waiver from Davis. Accordingly, Davis has failed to show that counsels' performance was deficient in this regard.

As to the failure to include Davis in bench conferences held during trial, Davis failed to cite any authority to support his contention that a bench conference is a critical stage at which a defendant is entitled to be present. . . . Davis also failed to demonstrate that he ever requested to be present and was denied such an opportunity.

As to the hearing about Dorothy Farrell, the court finds first that Davis failed to establish the factual predicate for this claim, *i.e.*, that Davis was absent. . . .

. . . Davis has failed to establish that the performance of his trial counsel in failing to

object to Davis' absence from certain proceedings was constitutionally deficient. It follows as a matter of course, therefore, that the performance of his *appellate* counsel was not deficient in failing to raise in the motion for new trial and on appeal a claim that trial counsel had rendered ineffective assistance in failing to ensure Davis' presence at those certain proceedings.

In Claim IX, ... [t]he court finds as a matter of fact that only a very limited amount of evidence of the victim's "worth" was admitted. . . . The court finds as a matter of law... that counsel at trial did not render deficient performance in failing to object to the evidence, and, consequently counsel on appeal did not render deficient performance in failing to raise the issue of victim impact evidence.

In Claim X, ... Davis failed to overcome the strong presumption that appellate counsels' performance was constitutionally adequate.

In Claim XI. . . . . counsels' performance in attacking the Georgia death penalty statute and its application in Davis' case was reasonably effective.

As to Claim XII, ...Davis' attorneys raised and litigated several alleged errors in the jury instructions . . . . [and] the primary defense team added additional grounds to the motion for new trial regarding the trial court's charge to the jury . . . . [C]ounsels' performance in challenging the jury instructions was reasonably effective.

With regard to Claim XIII, ... [b]ecause the Georgia Supreme Court had clearly

> foreclosed this line of argument [as to the UAP], and because the United States Supreme Court had in several cases declined to grant a writ of certiorari and had therefore evidenced no concern about those rulings, . . . Davis' counsel on appeal did not . . . render ineffective assistance of counsel by failing to raise an attack on the constitutionality of the UAP on appeal.
>
> [As for) Claim XIV,. . . . the primary defense team raised several issues in the motion for new trial and on appeal with regard to the constitutionality of the death penalty statute and its application in Davis' case. . . . [C]ounsel effectively raised and litigated these issues on motion for new trial and on appeal by setting out the applicable legal standards, discussing the relevant facts, and arguing cogently that the death penalty was inappropriate and unconstitutional in this case. Accordingly, Davis has failed to establish that the performance of his counsel on appeal fell outside the wide range of reasonable professional representation.

Id. at 15-20.

As for Petitioner's conflict-of-interest assertion, and as noted above in the discussion of Claim Five, the Georgia Supreme Court found that Petitioner failed to show that "an actual conflict of interest" existed, noting in particular that "'any conflict that might have stemmed from [counsel's] interest in protecting his professional standing evaporated' when he took active, professionally-responsible steps to facilitate the litigation of Davis's claims of ineffective assistance." Davis v. Turpin, 273 Ga. at 249 (quoting *Fields v. Attorney General of Md.*, 956 F.2d 1290,1298-99 (4th Cir. 1992)).

2) Performance of ineffectiveness counsel

With respect to ineffectiveness counsel's post-conviction performance, the state habeas court concluded that Petitioner had "failed to carry his burden of proof on both prongs of the Strickland test" as to whether ineffectiveness counsel provided ineffective assistance of counsel at the motion for new trial or on appeal. Id. at 28. Justifying the court's conclusion are the following findings:

> [Ineffectiveness counsel] independently decided what issues to raise after reviewing the trial transcript and counsels' file, consulting with Davis, and performing significant outside-the-record investigations.
>
> On the amendment to the motion for new trial, [ineffectiveness counsel] raised sixteen separate claims of ineffective assistance of counsel at trial. . . . [He] filed a separate appeal of the denial of the motion for new trial and identified the same sixteen issues . . . as the "Enumeration of Errors"
>
> . . . [I]neffectiveness counsel did not fail to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." . . . [H]e took steps to educate himself in the applicable law and effective strategy. . . .
>
> . . . [T]he court finds no support in the law that being represented by different sets of lawyers with regard to different issues creates any per se conflict of interest.
>
> . . . Davis failed to demonstrate that his appellate attorneys acted under an actual conflict of interest or that he was prejudiced by any potential conflict of interest.

Id. at 23-28. The Georgia Supreme Court found no abuse of discretion in the conclusion of the state habeas court and noted in particular that "nothing in the trial court or habeas court records suggests that Davis's supplemental appellate counsel had divided loyalties or allowed his actions to be in any way negatively affected by the simultaneous representation." Davis v. Turpin, 273 Ga. at 248.

This Court finds that the state habeas court correctly applied federal standards in finding "reasonably effective" performance as to all matters raised regarding ineffectiveness and that the Georgia Supreme Court's affirmance likewise reflected application of correct federal standards. Further, this Court finds that the state habeas court's determinations regarding appellate and ineffectiveness counsel's effectiveness were not based on an unreasonable determination of the facts in light of the evidence presented. This Court observes that many of the numerous allegations of ineffectiveness can be explained on their face as trial strategy. No case, even one presented on appeal, is bullet-proof-retroactive dissections can virtually always provide colorable indications of imperfect trial strategy. Such imperfections, however, fall far short of showing constitutionally ineffective assistance of counsel.

d. No excuse of procedural default

Petitioner asserts that the conflict of interest created by the trial court in appointing dual counsel constitutes "cause" for ineffectiveness counsel's failure to investigate, develop, and raise each and every aspect of trial counsel's effectiveness." Reply Mem. at 16 (Doc. 18). Because, as noted above in the discussion of Claim Five, there was no conflict of interest, this argument fails.

Petitioner also asserts that the ineffectiveness of ineffectiveness counsel for failing to raise the defaulted (at issue) claims at motion for new trial and on direct appeal constitutes "cause" excusing Petitioner's procedural default.

Because, as found above, ineffectiveness and appellate counsel were not ineffective, this argument fails.

Finally, Petitioner asserts that a fundamental miscarriage of justice would result from this Court declining to consider the procedurally defaulted portions of Claim Six on their merits. Petitioner alleges that evidence was available to support trial counsel's theory that Sylvester Coles was the shooter and not Petitioner and that Petitioner was prejudiced by the absence of that evidence from the purview of the jury. Because the theory that Coles was the shooter was presented to and rejected by the jury, see discussion of Claim Seventeen, infra, this argument fails.

Therefore, Petitioner's procedural default of issues raised in paragraphs 3 through 24 and paragraph 25 (f) of Claim Six is not excused.

For the foregoing reasons, no federal habeas relief is available through Claim Six.

G. Claim Seven -- prejudicial and inflammatory evidence

1. Substance and background of claim

In Claim Seven, Petitioner asserts that the introduction of prejudicial and inflammatory evidence at trial unconstitutionally affected his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner asserts that the admission into evidence of "gruesome repetitive photos" of numerous crime scene photographs, autopsy photographs of the murder victim, and photographs of Larry Young's injuries was improper in that the photographs lacked probative value, were cumulative, and served to inflame and prejudice the jury.

Petitioner's challenges as to the admissibility of certain photographs having been rejected by the Georgia Supreme Court, see Davis v. State, 263 Ga. at 9 (12) (finding no error

in admitting photographs of victim), the state habeas court denied relief as to the substance of this claim by declining to address any issues concerning photographs of the murder victim after finding them barred from consideration in a state habeas inquiry pursuant to principles of res judicata. See State Habeas Order at 34; see also supra note 2 (stating applicable Georgia law considered by state habeas court).

With respect to Petitioner's challenges as to the propriety of admitting certain photographs not previously placed into issue, the state habeas court found that those challenges had been "waived by not being raised and litigated at the first available opportunity." State Habeas Order at 34.

2. Discussion

a. Photographs of victim

The state habeas court denied habeas relief as to the admission of certain photographs of the victim because the Georgia Supreme Court had ruled adversely to Petitioner's assertion of error regarding their admission. Thus, Petitioner must show that the Georgia Supreme Court's decision either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d). The Georgia Supreme Court's factual findings underlying its decision are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

In finding no error in the admission of the photographs, the Georgia Supreme Court relied on Love v. State, 259 Ga. 468, 383 S.E.2d 897 (1989) and on Scott v. State, 250 Ga. 195, 297 S.E.2d 18 (1982). The Love court ruled that relevance and necessity are key to admission of autopsy photographs. See Love, 259 Ga. at 468 (2). The Scott court

ruled that a defendant's stipulation to cause of death does not automatically preclude admissibility. Scott, 250 Ga. at 198-99. The law of these cases does not contravene established federal law, and Petitioner's claim does not include specific allegations showing that, as Petitioner argues, the "evidence lacked probative value [and] was cumulative," Reply Mem. at 18 (Doc. 18). Petitioner merely contends, without elaboration, that "the court allowed the state to introduce numerous crime scene and autopsy photographs of the victim of the crimes with which Petitioner was charged." Compl. at 60 (Doc. 2). Since Petitioner has produced no evidence rebutting the presumption of correctness afforded to the Georgia Supreme Court's finding, this portion of Claim Seven does not provide a basis for habeas relief.

b. Other photographs

Any issue as to the admissibility of photographs not raised on direct appeal has been procedurally defaulted without excuse. Petitioner was aware of which photographs were admitted at his trial, and because ineffectiveness counsel and appellate counsel were not constitutionally ineffective in failing (or declining) to raise any such issue on appeal, no "cause" has been shown to excuse Petitioner's procedural default. Further, there is no danger of miscarriage of justice, in that this Court is satisfied that no constitutional error occurred.

H. Claim Eight: Petitioner's absence from critical stages of proceedings

1. Substance and background of claim

In Claim Eight, Petitioner asserts that his constitutional rights were violated due to his absence from the courtroom during critical stages of the proceedings, specifically, *(1)* during the session outside the presence of the jury when Dorothy Ferrell, her parole officer, and Petitioner's defense

counsel were questioned regarding Ferrell's motives for testifying against Petitioner, *(2)* during the pre-trial hearing to decide whether his case would be bound over to the superior court for trial, and *(3)* during numerous bench conferences at which evidentiary matters were discussed and decided.

The state habeas court denied habeas relief as to Petitioner's absence from critical stages of his trial on a procedural default basis. State Habeas Order at 35 ("[T]o the extent that Davis' primary defense team could have raised objections to his absence from any proceedings at trial - and failed to do so - Claim VIII has been waived . . . ."). The Georgia Supreme Court, affirming the denial of habeas relief, found that Petitioner's claim of appellate counsel's ineffective assistance (in failing to raise, on appeal, the issue of his absence) did not constitute sufficient cause and prejudice to overcome the procedural bar. Davis v. Turpin, 273 Ga. at 249.

2. Conclusion

This Court finds that the state habeas court relied on an adequate and independent state law basis in declining to address the allegations of this claim. In addition, this Court finds that the Georgia Supreme Court's affirmance of the habeas court's determination that the substance of Claim Eight had been procedurally defaulted and that Petitioner had failed to show cause to excuse the default is not contrary to, or an unreasonable application of clearly established federal law. The Court further finds no danger of miscarriage of justice. Accordingly, Petitioner is not entitled to habeas corpus relief pursuant to Claim Eight.

I. Claim Nine: introduction of victim impact evidence

1. Substance and background of claim

In Claim Nine, Petitioner asserts that the trial court allowed the prosecution to introduce victim impact evidence

in violation of Petitioner's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The state habeas court denied habeas relief as to the substance of Claim Nine, finding that it had been waived. State Habeas Order at 35. That court further held that because Petitioner's counsel did not render ineffective assistance, any alleged deficiencies in counsel's performance could not serve as "cause" excusing Petitioner's failure to raise the substance of federal Claim Nine earlier. See id. at 36. The state habeas court also implicitly found a lack of "prejudice." Id.

2. Discussion

Claim Nine has been procedurally defaulted. The state habeas court expressly stated that its denial of habeas relief on the basis of the issue presented in Claim Nine was based on Petitioner's "waive[r] under Black v. Hardin by not being raised and litigated at the first opportunity" and the lack of cause excusing that default, id. at 35-36, and the court correctly applied a procedural default principle of state law to arrive at that conclusion. Even if "cause" had been shown, the state habeas court's implicit finding of a lack of prejudice to Petitioner - that the "admission of a scant amount of evidence arguably relating to the victim's worth was not prejudicial," id. at 36 - resulted from an adequate and independent state procedural ground and was not an unreasonable determination of facts in light of the evidence. This Court finds that admission of the evidence at issue in Claim Nine did not amount to harmful error threatening the constitutionality of Petitioner's conviction and death sentence so as to effect a miscarriage of justice.

Because the state habeas corpus court properly found this claim to have been procedurally defaulted, and because this Court finds no excuse of said default, no federal habeas relief is available through Claim Nine.

J. Claim Ten: prosecutorial misconduct

1. Substance and background of claim

In Claim Ten, Petitioner asserts that the prosecutor's inflammatory and improper comments, arguments and conduct at trial (including vouching for the thoroughness of the State's investigation, vouching for the truthfulness of the State's witnesses, attempting to discredit Petitioner's defense based on his exercise of his constitutional rights, urging consideration of matters not in evidence, misstating the evidence and the law, urging the jury to convict Petitioner because he had not proved his innocence, and improperly injecting emotion into the proceedings) rendered Petitioner's convictions and death sentence fundamentally unfair and deprived him of due process.

The state habeas court held that any issues as to prosecutorial misconduct at trial had been waived by Petitioner for failure to raise them at trial and on appeal and also found that alleged deficiencies in counsel's performance could not excuse Petitioner's failure to raise the issues now presented in Claim Ten of his federal petition. State Habeas Order at 36.

2. Conclusion

Claim Ten has been procedurally defaulted. The state habeas court's holding was a "clear and express" statement that the state habeas court's judgment as to the issues now presented in Claim Ten rested on a finding of procedural default, and the court correctly applied a procedural default principle of state law to arrive at that conclusion. See Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999) ("[W]here the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred, [Wainwright v. Sykes, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977),] requires the federal court to respect the state court's decision."); Black,

255 Ga. at 239-40 (construing Georgia habeas corpus state, O.C.G.A. § 9-14-42).

No cause for the default of the issues in Claim Ten having been shown, there is no need to inquire into any possible prejudicial effect of such default. Because this Court is satisfied that no constitutional error occurred with respect to Claim Ten to render Petitioner's conviction and death sentence constitutionally infirm, there is no issue regarding miscarriage of justice. See Schlup, 513 U.S. at 316. Accordingly, no habeas relief is available to Petitioner through Claim Ten.

K. Claim Eleven: discriminatory process

1. Substance and background of claim

in Claim Eleven, Petitioner asserts that the pattern and practice of Georgia prosecuting authorities, courts, and juries is to discriminate on the bases of race, sex, and poverty in the administration of rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. Petitioner asserts that the decision to seek the death penalty in Petitioner's case and the sentence of death directly resulted from the inherent discrimination in Georgia's death penalty statute. He alleges that statistical information (showing that connections between factors of race, sex or economic status of accused and victim had a predictable outcome on the imposition of the death penalty in capital cases in Georgia) were clearly apparent in the prosecution and conviction of Petitioner. He also submits that the rulings of the state courts are contrary to and/or an unreasonable application of clearly established federal law.

This issue having been rejected on direct appeal to the Georgia Supreme Court, see Davis v. State, 263 Ga. at 10 (18), the state habeas court declined to address the substance of Claim Eleven after finding it barred from reconsideration pursuant to principles of res judicata, State Habeas Order at

37; see also supra note 2 (stating applicable Georgia law considered by state habeas court), thereby denying Petitioner habeas relief as to Claim Eleven.

2. Discussion

Because the state habeas court denied habeas relief as to the substance of federal Claim Eleven on the basis that the issue had been litigated and decided adversely to Petitioner in his direct appeal, Petitioner must show that the Georgia Supreme Court's decision was either based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d).

To succeed in an equal protection challenge, a petitioner must demonstrate that the decisionmakers in his case acted with discriminatory purpose and that "the purposeful discrimination had a discriminatory effect on him." McClesky v. Kemp, 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262 (1987) (internal punctuation omitted).

In this case, the Georgia Supreme Court held that the death penalty laws in Georgia are not unconstitutional for any reasons alleged, Davis v. State, 263 Ga. at 9 (13), and found that Petitioner's "sentence of death was [not] imposed under the influence of passion, prejudice or *other arbitrary factor*," id. at 10 (18) (citing O.C.G.A. § 17-10-354)) (emphasis added). This finding is presumed correct absent clear and convincing evidence presented by Petitioner in rebuttal. See 28 U.S.C. § 2254 (e)(1).

Petitioner has presented no clear and convincing evidence rebutting the Georgia Supreme Court's finding that his death sentence was not unconstitutionally discriminatory. This Court therefore finds no reason not to defer to the findings of the Georgia Supreme Court regarding as to Petitioner's

challenge on direct appeal. Accordingly, no habeas relief is available on the basis of Claim Eleven.

L. Claim Twelve: jury instructions

1. Substance and background of claim

In Claim Twelve, Petitioner asserts that he was denied due process of law by the instructions provided to the jury at the guilt-innocence and penalty phases of his trial, and that as a result, his right to meaningful and reliable determinations of guilt and sentence was violated, contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments.

The state habeas court declined to address the erroneous jury instructions claim. Noting that "several alleged errors in the jury instructions, particularly with regard to aggravating circumstances," had been litigated on appeal and decided adversely to Petitioner, the court found that to the extent Petitioner's trial counsel "failed to raise objections to any jury instructions given at trial, [the erroneous jury instruction claim) has been waived under Black v. Hardin by not being raised and litigated at the first available opportunity." State Habeas Order at 38. The state habeas court further held that because petitioner's counsel did not render ineffective assistance, any alleged deficiencies in counsel's performance could not excuse petitioner's failure to raise the substance of federal Claim Twelve earlier. Id.

2. Conclusion

In that counsel was not ineffective in not raising the subclaims presented in Claim Twelve, this Claim has been procedurally defaulted without excuse. The Court finds that the jury instructions underlying Claim Twelve do not violate Petitioner's right to meaningful determinations of guilt and sentence so as to amount to a miscarriage of justice. Accordingly, no habeas relief is available through Claim Twelve.

M. Claim Thirteen - Unified Appeal Procedure

1. Substance and background of claim

In Claim Thirteen, Petitioner asserts that his constitutional rights to due process were violated by the trial court's adherence to Georgia's Unified Appeal Procedure (the "UAP"). Petitioner argues that the UAP, for no rational reason, denies a capital defendant his right to equal protection under the law by imposing costs upon the capital defendant but not upon other criminal defendants, by violating a defendant's right to be heard only through counsel, and by violating the attorney-client relationship without a waiver from the client. Petitioner asserts that because he was tried, convicted, and sentenced pursuant to the UAP, he was denied minimal fairness and the reliability essential in capital cases.

Petitioner asserts the following specific complaints regarding the UAP: The UAP requires the trial court to hold conferences with the defendant, the defense counsel, and the prosecutor at various stages throughout the course of a capital case. Pursuant to the UAP, the defense is required to disclose strategy and tactics without imposing a similar burden upon the State. In addition, a defendant is repeatedly asked whether he is satisfied with his attorney, thereby imposing "an impossible task" upon a lay defendant under the strain of a trial without independent counsel to assist him in making this judgment. The UAP thrusts the trial court directly into the attorney-client relationship and requires counsel to advise a petitioner of issues which have little relevance to his case and takes away from time better spent on relevant issues.

The state habeas court held that the substance of federal Claim Thirteen had been waived by not being raised and litigated at the first available opportunity. State Habeas Order at 39. The state habeas court further held that because Petitioner's counsel did not render ineffective assistance, any alleged deficiencies in counsel's performance could not serve

as "cause" excusing Petitioner's failure to raise the substance of federal Claim Nine earlier. See id.

2. Conclusion

This claim has been procedurally defaulted. The state habeas court expressly stated that its judgment rested on a finding of procedural default. The state habeas court correctly applied the independent and adequate procedural default principle of state law of "waiver" to arrive at that conclusion, see Bailey, 172 F.3d at 1302-03 (construing Wainwright, 433 U.S. at 87); Black, 255 Ga. at 239-40, and the court also correctly determined that no cause existed to excuse the default.

In that Petitioner was well aware that the UAP was in effect throughout the trial proceedings, this Court finds that the state habeas court's determination that the substance of this claim has been procedurally defaulted without cause to excuse the default is sound. This Court further finds that there is no threatened miscarriage of justice in not disturbing the state habeas court's determination. Accordingly, federal habeas relief is not available to Petitioner on the basis of the allegations in Claim Thirteen.

N. Claim Fourteen - cruel and unusual punishment

1. Substance and background of claim

In Claim Fourteen, Petitioner asserts that application of the death penalty as to him constitutes cruel and unusual punishment and violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Petitioner contends that the death sentence rendered on the record in his case is arbitrary and capricious in that it fails to distinguish why Petitioner, who had no prior criminal record before the events in this case, deserves a death sentence although other more culpable defendants have

received life imprisonment in Georgia courts despite longer criminal histories and less mitigating evidence.

The disproportionality issue presented in Claim Fourteen having been rejected on direct appeal to the Georgia Supreme Court, Davis v. State, 263 Ga. at 10 (18), the state habeas court declined to address that issue after finding it barred from reconsideration pursuant to principles of res judicata, State Habeas Order at 39-40; see also supra note 2 (stating applicable Georgia law considered by state habeas court), thereby denying Petitioner habeas relief as to Claim Fourteen. The Georgia Supreme Court, affirming denial of habeas relief, rejected the substance of Claim Fifteen on its merits. Davis v. Turpin, 273 Ga. at 245. 2. Discussion

Because the Georgia Supreme Court ruled adversely to Petitioner's assertion of error regarding the substance of Claim Fourteen on direct appeal of his conviction and sentence, and because the Georgia Supreme Court again ruled adversely to Petitioner on that issue in his appeal of the state habeas court's denial of habeas relief, Petitioner must show that the Georgia Supreme Court's decisions either were based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding[s]," or were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d). Any factual findings underlying the Georgia Supreme Court's decisions are presumed to be correct absent clear and convincing evidence produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

Under federal law, the death penalty may not be imposed arbitrarily and capriciously. See Maynard v. Cartwright, 486 U.S. 356, 362, 108 S. Ct. 1853, 1858, 100 L. Ed. 2d 372 (1988) ("Since Furman [v. Georgia, 408 U.S. 238, 313, 92 S. Ct. 2726,33 L. Ed. 2d 346 (1972)), our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional

requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). In Georgia, "the court shall determine . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c)(3).

In addressing Claim Fourteen, the relevant issues are whether the Georgia Supreme Court's findings as to the issues presented were unreasonable and whether Georgia's death penalty is arbitrarily, capriciously, and discriminatorily imposed.

Petitioner argues that the goal of proportionality review is to assure that similarly situated defendants receive similar sentences, that the process be rational and not capricious, and that the ultimate sentence which the State can exact from a criminal be reserved for the most severe of murders. Petitioner contends that there is no constitutionally permissible way to distinguish the few cases in which the death penalty has been imposed in Georgia - Petitioner's case in particular -- from the many similar cases in which a lesser punishment has been imposed in Georgia. Petitioner contends that his sentence is disproportionate under the circumstances and that the proportionality review conducted in Georgia is constitutionally infirm in general and as applied to Petitioner.

As part of Petitioner's direct appeal, the Georgia Supreme Court considered a proportionality claim. See Davis v. State, 263 Ga. at 10 (18). The proportionality review included a comparison of "similar cases, considering both the crime and the defendant." Id. On appeal of the denial of habeas relief, the Georgia Supreme Court emphasized that "the method by which this Court conducts its proportionality review satisfies Georgia statutory requirements and is not unconstitutional." Davis v. Turpin, 273 Ga. at 245. The court explained:

> "It is the reaction of the sentencer to the evidence before it which concerns this court and which defines the limits which sentencers in past cases have tolerated, whether before or after [Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)]. When a reaction is substantially out of line with reactions of prior sentencers, then this court must set aside the death penalty as excessive." Because it is a jury's reaction to the evidence before it that concerns this Court in its proportionality review, it is irrelevant if the sentences in the cases used for comparison were already at the time, or later are, reversed for reasons unrelated to the juries' reactions to the evidence.
>
> Finally, Davis contends that other defendants have received sentences less than death for crimes of similar gravity. In light of the severely aggravated nature of Davis's crime, we find no merit in his contention that the death penalty would be unlawfully disproportionate in his case, even if a new proportionality analysis were undertaken.

Id. at 245-46 (quoting Ross v. State, 233 Ga. 361, 366-67, 211 S.E.2d 356 (1974)).

This Court finds that the Georgia Supreme Court's review of Georgia law and its determination that Petitioner's sentence was not disproportionate and thus not unconstitutionally imposed was neither based on an unreasonable determination of the facts in light of the evidence presented on appeal nor contrary to or involving an unreasonable application of federal law as determined by the Supreme Court of the United States, particularly in light of the following statement made by the high Court-

> [W]e are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

Gregg v. Georgia, 428 U.S. 153, 187, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976).

Pursuant to the above, the Court concludes that no federal habeas relief may be afforded Petitioner on the basis of the allegations in Claim Fourteen.

O. Claim Fifteen: improper jury panel exclusions and inclusions

1. Substance and background of claim

In Claim Fifteen, Petitioner asserts that the trial court erred in excusing from the jury panel, over Petitioner's objection, certain jurors who were opposed to the death penalty and in placing upon the panel certain jurors who had formed opinions regarding the Petitioner's guilt, thereby denying Petitioner due process and equal protection of the law and violating his rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

Petitioner makes several specific assertions regarding trial court error in placing jurors on the jury panel over Petitioner objection. Petitioner asserts that the trial court erred in placing one individual on the jury panel after that individual stated that he had a predisposition for the imposition of the death penalty. He asserts that the trial court erred by placing an individual on the panel after that individual expressed an opinion that Petitioner was guilty. He asserts that the trial court erred in placing an individual on the panel after the individual stated some knowledge of the parole system, and in

denying Petitioner's counsel the opportunity to voir dire that juror as to her knowledge. He asserts that an individual who was placed on the jury panel over Petitioner's objection after she stated an opinion regarding a number of the State's witnesses with whom she was acquainted should have been excused for cause.

Petitioner also asserts that the Court erred in excusing seven jurors from the panel who stated that they held opinions in opposition of the death penalty.

This claim was raised and rejected by the Georgia Supreme Court on direct appeal of Petitioner's convictions and sentence. Davis v. State, 263 Ga. at 7.

2. Discussion

Because the Georgia Supreme Court ruled adversely to Petitioner's assertion of error regarding the exclusion and inclusion of jurors, Petitioner must show that the Georgia Supreme Court's decision either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d). Any factual findings underlying that decision are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

The Georgia Supreme Court found that Petitioner's assertions regarding jury selection did not show any unconstitutional qualification or disqualification of jurors, that the trial court was within its discretion in limiting voir dire examination with respect to parole and in finding jurors to be qualified, and that any error in qualifying a prospective juror who is not utilized on the traverse jury is harmless. See Davis v. State, 263 Ga. at 7(6), (7), (8), (9).

Petitioner has not shown that the Georgia Supreme Court's decisions with respect to the issues presented in Claim Fifteen were based on an unreasonable determination of the facts in light of the evidence presented on appeal or that the decision was contrary to or involved an unreasonable application of federal law. Accordingly, no habeas relief is available through Claim Fifteen.

P. Claim Sixteen: exclusion of mitigating evidence

1. Substance and background of claim

In Claim Sixteen, Petitioner asserts that the trial court erred in excluding mitigation evidence in violation of Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments. The excluded mitigation evidence consisted of letters from Petitioner's friends and family that Petitioner sought to introduce in mitigation at the sentencing phase of his trial. Sent. Tr. 31-32. After the defense had presented live testimony from family and acquaintances who testified on behalf of Petitioner as to his character, Sent. Tr. at 14-31, the prosecutor objected to the admission of several pages of handwritten letters from individuals on the basis that they were "the rankest hearsay to the extent that they are written by witnesses who may testify," and that they were "wholly redundant to any testimony that's offered live and in court," Sent. Tr. at 31-32. The trial court sustained the prosecutor's objection, and the letters were not admitted. Sent. Tr. at 32.

The issue underlying Claim Sixteen was raised and rejected by the Georgia Supreme Court on direct appeal of Petitioner's conviction and sentence. Davis v. State, 263 Ga. at 9 (14).

2. Discussion

Because the Georgia Supreme Court ruled adversely to Petitioner's assertion of error regarding the mitigation evidence at issue, Petitioner must show that the Georgia

Supreme Court's decision either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d). Any factual findings underlying that decision are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

Under established federal law, "the sentencer, in all but the rarest kind of capital case, shall not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Locket v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973 (1978) (first emphasis in original, second emphasis added) (finding statutory limitations on court's power to admit mitigation evidence incompatible with Eighth and Fourteenth Amendments); see also Skipper v. South Carolina, 476 U.S. 1, 8, 106 S. Ct. 1669, 1673, 90 L. Ed. 2d (1986) (holding that where exclusion of relevant mitigating evidence "impede[s] the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender," resulting death sentence cannot stand); Green v. Georgia, 442 U.S. 95, 97, 99 S. Ct. 2150, 2151-52,60 L. Ed. 2d 738 (1979) (reversing death sentence imposed because of mechanistic application of state hearsay rule "to defeat the ends of justice"); Alley v. Bell, 307 F.3d 380, 398-99 (6th Cir. 2002) (noting that Locket rule "limits the traditional discretion of state courts to exclude evidence based on state evidentiary rules" but citing Tenth and Fourth Circuit decisions indicating that Locket does not preclude exercise of discretion to apply state rule of evidence at sentencing phase).

On appeal of Petitioner's conviction and sentence, the Georgia Supreme Court found no error in the trial court's "requiring defense mitigation witnesses to testify subject to cross-examination and not allowing the defense merely to introduce in evidence written letters from family members and neighbors." Davis v. State, 263 Ga. at 9 (14). The court specifically rejected Petitioner's contention that hearsay evidence must be admitted at the sentencing phase of a death-penalty case, Id. (citing Green, 442 U.S. 95, and Isaacs v. State, 259 Ga. 717, 737 (37), 386 S.E.2d 316, 333 (1989)).

This Court finds that Petitioner has not shown that the Georgia Supreme Court's denial of relief based on the substance of Claim Sixteen was based on an unreasonable determination of the facts in light of the evidence or that the decision was contrary to or an unreasonable application of established federal law. Accordingly, no federal habeas relief is afforded Petitioner through Claim Sixteen.

Q. Claim Seventeen: totality of procedural and substantive errors

1. Substance and background of claim

In Claim Seventeen, Petitioner argues that his federal habeas claims should be considered in the aggregate. Positing that "[w]hile there are means for addressing each individual error, the fact is that addressing these errors on an individual basis will not afford adequate safeguards against an improper conviction and improperly imposed death sentence" as provided by the Constitution, Petitioner contends that the sheer number and types of errors involved in his trial virtually dictated the sentence that he would receive. As a result, Petitioner argues, the process itself failed him, and he did not receive the fundamentally fair trial to which he was entitled.

The state habeas court denied relief as to Claim Seventeen on its merits. State Habeas Order at 40-42. The Georgia Supreme Court affirmed the denial of Petitioner's petition but

did not specifically address the substance of Claim Seventeen. Davis v. Turpin, 263 Ga. 5.

2. Discussion

In that the Georgia Supreme Court did not address Petitioner's aggregation argument, the ultimate question is whether the state habeas court's denial of habeas relief as to the substance of Claim Seventeen resulted in a decision that either was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding" on appeal, or was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States:" See 28 U.S.C. § 2254 (d). Any factual findings underlying that decision are presumed to be correct absent "clear and convincing evidence" produced by Petitioner in rebuttal. See id. § 2254 (e)(1).

The state habeas court construed Claim Seventeen as an argument that because the miscarriage of justice exception is applicable, Petitioner should not be denied habeas relief solely on the basis of application of procedural bars. Noting "the importance of the habeas corpus process in avoiding the application of the death penalty in inappropriate cases even where problems with the trial do not fit neatly into any formulaic analysis of the accused's rights," State Habeas Order at 41, the state habeas court based its analysis of this claim on "a thorough review of the entire trial record, the record on appeal, and the evidence introduced during the trial of the habeas petition," id.

The court addressed in particular Petitioner's allegations in the state claim corresponding to federal Claim Four and acknowledged that there were "many items of substantive and impeachment evidence which allegedly would [have undermined] the testimony of witnesses who identified [Petitioner] as the person who fired the shots that killed Officer McPhail, [for example], by showing that Sylvester

Coles, rather than [Petitioner], was the shooter." Id. Nonetheless, the state habeas court concluded:

> Although the failure to discover, admit or effectively argue the importance of these items of evidence would appear to place this case in the category of a case of "mistaken identity," the court finds from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during Davis' trial. The jury, in its rightful role as finder of fact during the trial, was responsible for evaluating the credibility of the witnesses and determining whether the state proved beyond a reasonable doubt that Davis shot and killed Officer McPhail. This court, although acting now as the finder of fact in this habeas proceeding, cannot supplant the role of the jury and find based on its own review of the record that the jury should have concluded that the state did not carry its burden at Davis' trial. The core purpose of the writ of habeas corpus would not be served by such a presumptuous usurpation of the jury's deliberative process. This court is limited to evaluating whether Davis' rights were properly protected in the context of his jury trial.

Id.

This Court finds that the state habeas court's reading of this claim as an argument made to support application of the miscarriage of justice exception was a fair assessment of Petitioner's position. The "actual innocence" standard requires a "colorable showing of actual innocence," Bailey, 172 F.3d at 1306, that is strong enough to undermine the habeas court's "confidence in the outcome of the trial,"

Schlup, 275 F.3d at 316. Clearly, the state habeas court's confidence was not undermined by the evidence of actual innocence presented in the state proceeding.

As explained above, a federal court looks, under the miscarriage of justice exception, to colorable claims of actual innocence for "permission" to address questions of constitutional impropriety asserted in procedurally defaulted claims. See Schlup, 513 U.S. at 315-16; see also Brown, 229 F. Supp. 2d at 1362. If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" gateway need not be implemented. See Schlup, 513 U.S. at 316. Ultimately, the state habeas court's analysis serves as assurance that no constitutional deficiencies exist in this case so as to merit habeas corpus relief.

Pursuant to the above, Petitioner's petition for writ of habeas corpus (Doc. 2) is **DENIED**.

So ORDERED.

JOHN NAGLE
UNITED STATES DISTRICT JUDGE

Date: May 13, 2004

(3)

No. 06-1407

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In The
Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

WILLIAM TERRY, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION PRISON,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner can complain that no court has considered his "substantive actual innocence" claim, when he failed to present a "substantive actual innocence" claim in the federal habeas corpus court or on appeal to the Eleventh Circuit?

2.

Whether Petitioner can complain when the federal habeas corpus court conducts a "merits" review of Petitioner's constitutional claims without requiring the petitioner to meet the gateway inquiry of *Schlup v. Delo*, 513 U.S. 298 (1995)?

3.

Whether certiorari review is unwarranted in Petitioner's case, as the procedural history clearly demonstrates that Petitioner's assertion that the federal courts "ignored" his "actual innocence" claim is unfounded?

4.

Whether certiorari review in this case is unwarranted as it is clear that both the federal habeas corpus court and the Eleventh Circuit properly analyzed Petitioner's claims in light of *Schlup v. Delo*, 513 U.S. 298 (1995) and AEDPA principles?

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DENIAL OF SPECIFIC "FACTS" SET OUT IN THE PETITION

Respondent denies Petitioner's factual assertion that he has "compelling new evidence" of his "innocence" and that his post-trial affidavits "show that constitutional violations led to the conviction of an innocent man." (*See* Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 37-41).

Respondent also denies Petitioner's assertion that "no court has assessed the credibility of Mr. Davis' new evidence that underlies both his innocence and constitutional claims." (*See* Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

(a) Trial Proceedings in the Superior Court of Chatham County (1989-1991)

Petitioner, Troy Anthony Davis, was indicted in Chatham County, Georgia on November 15, 1989, for the murder of Officer Mark Allen McPhail, obstruction (against Officer Mark Allen McPhail), two counts of aggravated assault and possession of a firearm during the commission of a felony. At trial, conducted on August 19-30, 1991, Petitioner was represented by Robert Falligant and Robert Barker.

During opening statement, defense counsel Barker argued, "You're going to hear a story that is going to be

unbelievable. You are going to see a cast of characters that you will never have seen before, and they are unbelievable, and I mean that in any sense. They are just not worthy of belief." (T. 682.)[1]

Petitioner Davis testified in his own behalf at trial.[2] Petitioner admitted that he was at the scene of the shooting, but claimed he did not see who shot Officer McPhail because he was running away from the shooting and never looked back to see who did the shooting. (T. 1424; 1435). Petitioner specifically testified, "I heard the shot, but I didn't exactly see the shooting." (T. 1435).

As to Kevin McQueen, the jailhouse informant who testified that Petitioner admitted shooting Officer McPhail, Petitioner Davis claimed in his trial testimony that he did not know McQueen, that he had never made a statement to McQueen and that he was never in the same cell with McQueen. (T. 1459). Petitioner testified that he did not know Kevin McQueen personally and did not play basketball with McQueen. (T. 1431-1434). Petitioner Davis specifically denied ever telling McQueen that he killed the cop. (T. 1434).

Petitioner also denied that he shot Michael Cooper at the party in Cloverdale, which occurred the day before Officer McPhail's murder. In fact, Petitioner claimed that

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[1] T. 679-683. (The transcript of Petitioner's trial is contained in Respondent's Exhibit Nos. 15-21 filed in the federal habeas corpus court. References to the transcript of Petitioner's trial will be designated by "T.," followed by the appropriate page number. References to Respondent's Exhibit Nos. refer to the exhibits submitted in the district court.)

[2] T. 1415-1459.

he did not know Michael Cooper and saw him for the first time in the courtroom. (T. 1435).

Defense counsel for Petitioner presented the following five witnesses during the guilt-innocence phase of Petitioner's trial. Joseph Washington (T. 1339); Shelley Sams (T. 1352); Tonya P. Johnson (T. 1357); Jeffery Sams (T. 1372-1373) and Virginia Roberts Davis. (T. 1385).

Even during his trial, Petitioner claimed that Sylvester "Red" Coles was the murderer of Officer McPhail. Red Coles testified during Petitioner's trial and was extensively cross-examined by defense counsel.[3] (T. 899-974). However, Red Coles did not implicate Petitioner in the shooting of Officer McPhail, but merely stated that he and Petitioner were together when the shooting occurred. (T. 938-942). Red Coles testified he never saw Petitioner fire any shot that night and did not know who shot Officer McPhail. (T. 942).

During defense counsel's guilt phase closing argument,[4] defense counsel Robert Falligant argued:

> The first evidence and information they ever had in this case came from the mouth of the witness that the State put on the stand, and that was Sylvester Red Coles, the same individual who admitted having a gun, the same individual that numerous witnesses identified as having a gun that night, the same individual who admitted that he ran, he changed shirts, tried to conceal

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[3] The cross-examination of Red Coles appears on T. 919-951 of the guilt-phase transcript.

[4] Defense counsel's closing argument appears on pages 1506-1550 of the trial transcript.

his identity, the same individual who admitted he ran to a lawyer and turned himself in at four o'clock, but not to surrender for a crime, but to give the police the name of the person that they should be looking for.

And he gave them the name of Troy Anthony Davis, and from that point on, the entire focus of this investigation was not in deciding and finding the truth of this case as to who actually committed these crimes that the Defendant is now on trial for, but it was to find evidence to convict the Defendant of these crimes.

You see, at that point, the police knew, after talking to Sylvester Coles, that he, D.D. Collins, and the Defendant were on the lot that night. And yet what did the police do? They bought Mr. Coles' story hook, line, and sinker. They never considered Mr. Coles to be a suspect. They never considered Mr. Collins to be a suspect. What they considered them to be was witnesses.

They never questioned for one minutes (sic) the truth of what Sylvester Coles had to tell them. And then began this investigation. And they went out into this community, and they rounded up witnesses everywhere they could find them, and they paraded them in here, and Mr. Lawton talks about the overwhelming evidence in this case. We were overwhelmed by the number of witnesses in this case. But what about the quality, the credibility of those witnesses?

You, the jurors in this case are the sole judges of the credibility of those witnesses. . . . Seven witnesses put on that stand by the State of Georgia recanted, contradicted, or changed their testimony. . . . Many of those witnesses who came into

> this courtroom and changed their testimony and said, the first thing out of their mouth was, I'm not going to lie now. I want to tell the truth. . . . And let's talk about how those statements were taken. . . .

(T. 1507-1509).

Defense counsel also argued that there were "striking similarities in facial features" between Petitioner and Red Coles. (T. 1511). Later, defense counsel argued that Red Coles, not Petitioner, had the motive, means and opportunity to commit the murder. (T. 1518-1519).

As to jailhouse informant, Kevin McQueen, defense counsel argued, "Look at his record and see if you can attach any credibility to the story that he told" and "let's look at the story he told." (T. 1535-1536). Defense counsel again challenged McQueen's credibility by arguing, "I don't know why they even put a man like Kevin McQueen on the stand. The outrageous story that he concocted doesn't even begin to mesh, or it's not even similar to the incidents that occurred that night. But it was done to prejudice you." (T. 1537).

Finally, defense counsel argued, "This case is replete with reasonable doubt, and I submit to you that in your quest for the truth, what this case is all about, as you sift through this evidence and you review your notes about the consistencies, the prior inconsistent statements, the outright lies, the fabrications of the State's witnesses, if you reach the conclusion that the State has not carried its burden beyond a reasonable doubt, then as the Court will charge you, you'll be bound to acquit the Defendant." (T. 1549-1550).

On August 28, 1991, Petitioner was found guilty of one count of malice murder, one count of obstruction of a law enforcement officer, two counts of aggravated assault and one count of possession of firearm during the commission of a felony.

Petitioner Davis also testified during the sentencing phase of his trial. (Sentencing phase transcript, p. 52-67.)[5] Petitioner Davis asked the jury to spare his life, saying that "at the present time you've found me guilty of some offenses that I did not even commit." (T. 65). Defense counsel argued during sentencing phase closing argument that, "I know you've convicted Troy, and we have to accept that decision you've made. I know you've convicted him beyond a reasonable doubt. If in your mind there's certain little nagging lingering doubts, I hope you'll consider those today." (Sentencing phase transcript, p. 80).

Following the penalty phase, Petitioner was sentenced to death for the murder of Officer McPhail on August 30, 1991.

(b) Motion for New Trial Proceedings (1991-1992)

On September 12, 1991, the trial court appointed Petitioner's trial attorneys, Mr. Falligant and Mr. Barker, to represent Petitioner on appeal and appointed another attorney, Mr. C. Jackson Burch, to represent Petitioner specifically as to any issue of ineffective assistance of counsel which Petitioner might want to raise.

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[5] The transcript of the sentencing phase was Respondent's Exhibit No. 21 in the district court.

On October 1, 1991, Petitioner's original trial attorneys, Falligant and Barker, filed a motion for new trial on Petitioner's behalf, raising three grounds. On December 2, 1991, the trial court scheduled "the hearing on any potential ineffective assistance of counsel claims to immediately follow Defendant's hearing on his motion for new trial."

Mr. Falligant and Mr. Barker filed an amended motion for new trial, raising 26 grounds on February 14, 1992 and the hearing on this motion was held on February 18, 1992. Following Mr. Barker's presentation and argument of certain issues raised in the amended motion for new trial, co-counsel, Mr. Falligant, argued various additional portions of the amended motion for new trial and requested briefing on those issues. (MNT 11-22).[6]

Following the portion of the hearing on the motion for new trial conducted by trial counsel, Mr. Burch presented the portion of the hearing raising claims of trial counsel ineffectiveness. (MNT 25-42). Petitioner's lead trial counsel, Mr. Falligant, appeared and testified at this hearing. (MNT 33-40).

Immediately following this hearing, Mr. Burch filed an "Amendment to Motion for New Trial as to Ineffective Assistance of Trial Counsel," raising 16 different grounds of ineffective assistance of trial counsel. On February 28, 1992, Mr. Falligant and Mr. Barker filed an amendment to the amended motion for new trial, asserting an additional

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[6] References to the transcript of the February 18, 1992 motion for new trial hearing will hereinafter be designated by "MNT" followed by the appropriate page number. The transcript of Petitioner's motion for new trial was submitted as Respondent's Exhibit No. 22 in the district court.

ground. On March 12, 1992, the trial court denied Petitioner's ineffective assistance of counsel claim and also denied Petitioner's motion for new trial, as amended, on March 16, 1992.

(c) Consolidated Direct Appeal to the Georgia Supreme Court (1992-1993)

On appeal to the Georgia Supreme Court, the Court noted it was consolidating Petitioner's two appeals before the Court. *See Davis v. State*, 263 Ga. 5 (1993).

Petitioner's convictions and death sentence were unanimously affirmed by the Georgia Supreme Court in the consolidated appeal in *Davis v. State*, 263 Ga. 5 (1993).

In its decision, the Georgia Supreme Court summarized the facts presented at Petitioner's trial as follows:

> At midnight, on August 18, 1989, the victim, a police officer, reported for work as a security guard at the Greyhound Bus Station in Savannah, adjacent to a fast food restaurant. As the restaurant was closing, a fight broke out in which Davis struck a man with a pistol. The victim, wearing his police uniform – including badge, shoulder patches, gun belt, .38 revolver, and night stick – ran to the scene of the disturbance. Davis fled. When the victim ordered him to halt, Davis turned around and shot the victim. The victim fell to the ground. Davis, smiling, walked up to the stricken officer and shot him several more times. The officer's gun was still in his holster.
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> The victim wore a bullet-proof vest, but the vest did not cover his sides and the fatal bullet entered the left side of his chest and penetrated his

> left lung and aorta, and came to rest at the back of his chest cavity. The officer was also shot in the left cheek and the right leg.
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> The next afternoon, Davis told a friend that he had been involved in an argument at the restaurant the previous evening and struck someone with a gun. He told the friend that when a police officer ran up, Davis shot him and that he went to the officer and "finished the job" because he knew the officer got a good look at his face when he shot him the first time.
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> After his arrest, Davis told a cellmate a similar story.

Davis v. State, 263 Ga. 5, 6 (1993).

The Georgia Supreme Court also specifically found that the evidence presented at trial was sufficient to support the verdict, by stating that, "The evidence supports the conviction on all counts. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979)." *Davis v. State*, 263 Ga. 5, 7 (1993).

The Georgia Supreme Court also rejected the claims of ineffective assistance of counsel which had been raised in Petitioner's motion for new trial. *Davis v. State*, 263 Ga. 5, 10 (1993).

Petitioner's petition for a writ of certiorari was denied by this Court in *Davis v. Georgia*, 510 U.S. 950 (1993).

(d) State Habeas Corpus Proceedings (1994-1997)

On March 15, 1994, the Georgia Appellate Practice and Educational Resource Center, Inc. filed a habeas

corpus petition. On August 28, 1995, counsel for Petitioner filed a notice of withdrawal of named counsel and motion to continue, or alternatively, motion to withdraw, in the Butts County Superior Court and filed a supplemental motion to continue on October 13, 1995. On October 19, 1995, these motions were denied.

On November 13, 1995, Petitioner filed a petition for immediate review of the order denying continuance in the Georgia Supreme Court. The Georgia Supreme Court granted the petition for immediate review and on May 28, 1996, concluded that the habeas corpus court abused its discretion in denying Petitioner a continuance. *Davis v. Thomas*, 266 Ga. 835, 471 S.E.2d 202 (1996).

Petitioner filed a 79-page amendment to his state habeas corpus petition, raising 15 claims for relief, on November 6, 1996. During the state habeas corpus evidentiary hearing held on December 16, 1996, all four of Petitioner's trial counsel testified and Petitioner presented 33 affidavits. During this hearing, Petitioner was not restricted in the type of evidence that he could present.

During the state habeas corpus hearing, Petitioner's lead trial attorney, Robert Falligant, testified that the real issue at trial was:

> whether or not he [Davis], in fact, was the person who committed the crimes. And, quite frankly, based on the information that we had and the evidence I had, it appeared it was a very good likelihood that Sylvester Coles, also known as Red, was the one who actually killed Officer McPhail and shot, well not so much shot Michael Cooper, but the main issue in my case was the death of Office McPhail, and basically that is the

> emphasis we put on the investigation and what we were looking for.

(State habeas corpus transcript, volume 1, pp. 125-126).[7]

Mr. Falligant also testified concerning trial counsels' investigation of the case, by stating, "there is no way to say how many people we talked to. This case, there were so many rumors and so much talk on the street. We extensively investigated the case." (State habeas corpus transcript, p. 183). "We hired, we got funds for an investigator." (State habeas corpus transcript., pp. 183-184). Mr. Falligant further testified, "we really felt it was a very defendable case, but we just, you know, obviously, ran into a lot of dead ends, as you frequently do in these type of cases." (State habeas corpus transcript, p. 184).

Appellate/motion for new trial counsel Burch also testified at the state habeas corpus hearing that he believed trial counsel's investigation was reasonable, but he also investigated every lead that came to him regardless of whether it related to the guilt or innocence of the Petitioner. (State habeas corpus transcript, pp. 237, 222-223).

The state habeas corpus court denied Petitioner relief on September 9, 1997. In denying Petitioner relief, the state habeas corpus court found the following:

> from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during

[7] The transcript of Petitioner's state habeas corpus hearing was Respondent's Exhibit Nos. 59-62 in the federal habeas corpus court.

> Davis' trial. (cite omitted) The jury, in its rightful role as finder of fact during the trial, was responsible for evaluating the credibility of the witnesses and determining whether the state proved beyond a reasonable doubt that Davis shot and killed Officer McPhail. **This court, although acting now as the finder of fact in this habeas proceeding, cannot supplant the role of the jury** and find based on its own review of the record that the jury *should* have concluded that the state did not carry its burden at Davis' trial. The core purpose of the writ of habeas corpus would not be served by such a presumptuous usurpation of the jury's deliberative process. This court is limited to evaluating whether Davis' rights were properly protected in the context of his jury trial.

(State habeas corpus order of September 5, 1997, p. 41) (emphasis supplied).

The state habeas corpus court denied relief by finding all of Petitioner's claims "are procedurally barred by having been raised and litigated at trial and on appeal or by having been waived, with the exception of the claim that his attorneys provided ineffective assistance at the motion for new trial and appellate stages." (Respondent's Exhibit No. 69 in the district court, p. 43).

Petitioner appealed to the Supreme Court of Georgia from the denial of state habeas corpus relief. Petitioner filed a notice of appeal on September 25, 1997 and an application for a certificate of probable cause to appeal on December 10, 1997.

(e) Appeal to the Georgia Supreme Court from the Denial of State Habeas Corpus Relief (1997-2000)

On February 24, 2000, the Georgia Supreme Court granted Petitioner's application for certificate of probable cause to appeal from the denial of state habeas corpus relief and asked the parties to address four specific questions: (1) whether execution by electrocution constituted cruel and unusual punishment under our Federal and State Constitutions; (2) whether imposition of the death penalty in this case was disproportionate to the penalty imposed in other similar cases in Georgia; (3) whether Petitioner's appellate counsel operated under a conflict of interest; and (4) whether Petitioner's absence during critical stages of his trial violated his rights under our Federal and State Constitutions.

The Georgia Supreme Court affirmed the denial of state habeas corpus relief on November 13, 2000, in *Davis v. Turpin*, 273 Ga. 244 (2000), and denied Petitioner's motion for reconsideration on December 15, 2000. On May 14, 2001, Petitioner filed a petition for a writ of certiorari in this Court which was denied on October 1, 2001.

(f) Federal Habeas Corpus Proceedings (2001-2004)

Petitioner filed his application for federal habeas corpus relief in the U. S. District Court for the Southern District of Georgia, Savannah Division, on December 14, 2001. Respondent's answer was filed on February 11, 2002. Petitioner's motion for discovery was denied on September 19, 2002.

Petitioner's motion for an evidentiary hearing was denied on March 10, 2003. The order denying Petitioner's motion for an evidentiary hearing contradicts Petitioner's

assertion in his petition for certiorari that the federal habeas court did not consider his post-trial affidavits. In the order denying Petitioner's motion for an evidentiary hearing, the federal habeas corpus court extensively reviewed each affidavit proffered during the state habeas corpus proceedings and where applicable, compared the affiant's testimony to any testimony which was given during Petitioner's trial, as well as whether the affiant had previously provided an affidavit. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).[8]

In reviewing Petitioner's evidentiary hearing request, the federal habeas court scrutinized these affidavits, both to determine if they could have been submitted during state habeas corpus proceedings (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 40) and also, to determine if the presentation of these affidavits would undermine the court's confidence in the outcome of the proceeding.[9] (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 40-41).

The federal habeas court expressly stated that it would consider all of the affidavits and material admitted during state habeas corpus proceedings, but would not permit Petitioner to re-offer these affidavits during a

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[8] As the federal habeas court noted, with the exception of attorney testimony, all of the "actual innocence" testimony offered by Petitioner during state habeas corpus proceedings, was in affidavit form. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 39).

[9] In fact, the federal habeas corpus specifically examined each affidavit offered by Petitioner. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).

federal evidentiary hearing. Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 41).

Also contrary to Petitioner's current contention, the federal habeas court reviewed the trial testimony, including Petitioner's testimony, the evidence presented during state habeas corpus proceedings and found that even after Petitioner had been given a full opportunity to present any evidence in support of his "actual innocence" claim he had failed to establish that he was "factually innocent." (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22; 37-41).

The federal habeas court examined the post-trial affidavits relied upon by Petitioner, which he asserts have never been "examined" and the federal habeas court held that, "the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim." (Federal Habeas Court Order of 5/13/04, denying relief, p. 25).

The federal habeas corpus court denied Petitioner relief on May 13, 2004. Petitioner's motion to amend the judgment filed on May 13, 2004, was denied on June 3, 2004.

(g) Appeal to the Eleventh Circuit Court of Appeals (2004-2006)

Although the district court denied Petitioner's application for a certificate of appealability on July 20, 2004, the Eleventh Circuit granted Petitioner's application on September 15, 2004.

Following briefing and oral argument, the Eleventh Circuit began its examination of Petitioner's appeal from the denial of federal habeas corpus relief by noting that, "In this case, Davis does not make a substantive claim of actual innocence." *Davis v. Terry*, 465 F.3d 1249, 1251 (11th Cir. 2006).

The Eleventh Circuit proceeded to find that Petitioner "concedes" that all of his claims for relief are procedurally defaulted and that the federal habeas court actually considered the "merits" of Petitioner's constitutional claims, but nevertheless, "rejected them as a matter of law." *Davis v. Terry*, 465 F.3d 1249, 1252 (11th Cir. 2006).

The Eleventh Circuit rejected the claim which is the basis of this petition for certiorari, i.e., that the federal habeas court used the wrong test in determining that it would review the "merits" of Petitioner's procedurally defaulted claims. *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006).

The Eleventh Circuit concluded that Petitioner "cannot be heard to complain that the test for achieving a desired result was not applied, or not applied correctly, when the desired result was, in fact, obtained." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006).

Then, having reviewed the federal habeas corpus court's rejection of Petitioner's claims after reviewing these claims on "the merits," the Eleventh Circuit concluded that, "we cannot say that the district court erred in concluding that Davis has not borne his burden to establish a viable claim that his trial was constitutionally

unfair." *Davis v. Terry*, 465 F.3d 1249, 1256 (11th Cir. 2006).

PART TWO

STATEMENT OF THE FACTS

At approximately 1:00 a.m. on Saturday, August 19, 1989, Officer David Owens, of the Savannah Police Department, responded to a call of "an officer down" at the Greyhound bus station on Oglethorpe Avenue. (T. 759)[10]. Officer Owens found the victim, Mark McPhail, a 27-year-old Savannah police officer, lying face down in the parking lot of the Burger King restaurant next to the bus station. (T. 759). Officer McPhail's mouth was filled with blood and bits of his teeth were on the sidewalk. As he began administering CPR to the victim, Officer Owens noticed that the victim's firearm was still snapped into his holster. (T. 761).

Larry Young, who was present at the scene, told police that between midnight and 1:00 a.m. he had walked from the Burger King parking lot, which was frequented by transients and homeless individuals, to the convenience store down the block to purchase beer. (T. 797-798). Sylvester "Red" Coles saw Young leave the pool hall next door and began following Young demanding a beer. (T. 798). Coles continued to harass Mr. Young all the way back to the Burger King. (T. 799). When Young arrived at the parking lot, Harriet Murray and two unidentified men were sitting on a low wall by the restaurant. Petitioner, Troy Anthony Davis, and Daryl Collins, who had taken a shortcut to the parking lot, came

[10] References to the transcript of Petitioner's trial will be designated by "T.," followed by the appropriate page number.

out from behind the bank and surrounded Mr. Young. (T. 799). Mr. Coles, who was facing Mr. Young, told him not to walk away "cause you don't know me, I'll shoot you," and begin digging in his pants. (T. 845). The two men seated on the wall fled, and Ms. Murray ran to the back door of the Burger King, which was locked. (T. 799). Petitioner, who was behind Young and to his right, blindsighted him, striking him on the side of the face with a snub-nosed pistol, inflicting a severe head injury which formed the basis of Count III of the indictment. Mr. Young began to bleed profusely, and he stumbled to a van parked in front of the Burger King drive-in window, asking the occupants for help. (T. 803). When the driver did not respond, Petitioner went to the drive-in window, but the manager shut it in his face. (T. 803, 915).

In response to the disturbance in the parking lot, Officer McPhail, who was working as a security guard at the restaurant, walked rapidly from behind the bus station, with his nightstick in his hand and ordered the three men to halt. (T. 849). Mr. Collins and Petitioner fled, and Officer McPhail ran past Sylvester Coles in pursuit of Petitioner. (T. 851). Petitioner looked over his shoulder, and when the officer was five to six feet away, shot him. Officer McPhail fell to the ground, and Petitioner walked towards him and shot him again while he was on the ground. (T. 850). One eyewitness testified that Petitioner was smiling at the time. (T. 851). The victim died of gunshot wounds before help arrived.

Thirty minutes after the killing, Red Coles appeared at his sister's house a few blocks from the bus station. Mr. Coles asked his sister for another shirt. (T. 915). Shortly thereafter, Petitioner appeared and asked Mr. Coles for the yellow t-shirt Coles had been wearing. After he changed his shirt, Petitioner left. (T. 915). Petitioner fled

to Atlanta the following day and surrendered to authorities on August 23, 1989.

Pursuant to their investigation, police learned that on the night prior to the killing, Petitioner had attended a party on Cloverdale Drive in a subdivision near Savannah. (T. 1115-1116). During the party, Petitioner, annoyed that some girls ignored him, told several of his friends something about "burning them." (T. 146). Petitioner then walked around saying, "I feel like doing something, anything." (T. 1464). When Michael Cooper and his friends were leaving the party, Petitioner was standing out front. (T. 1120). Michael Cooper was in the front passenger seat, and as the car pulled away, several of the men in the car leaned out the window shouting and throwing things. (T. 1120, 1186). Petitioner shot at the car from a couple of hundred feet away and the bullet shattered the back windshield and lodged in Michael Cooper's right jaw. (T. 1186). Cooper was treated at the hospital and released and Cooper's injury formed the basis for Count IV of Appellant's indictment. The shooting incident took place approximately one hour before Officer McPhail was shot.

Shortly after Michael Cooper was shot, Eric Ellison and D.D. Collins picked up Petitioner in Cloverdale and took him to Brown's pool hall in Savannah. Red Coles, wearing a yellow t-shirt, was already at the pool hall.

An autopsy revealed that Officer McPhail was shot twice. One bullet entered the corner of his cheekbone on the left side and exited the back of his neck; the bullet blew away bits of his teeth, and his lip was impaled on his teeth. (T. 782-784). The second bullet passed through the armhole of McPhail's bullet-proof vest, and entered his chest on the left side. (T. 784). This bullet pierced the lung and the

aorta, and lodged in the opposite side between the third and fourth vertebrae, at the back of the chest cavity near the spinal column. (T. 784-787). The cause of the victim's death was a loss of blood from a gunshot wound to the left side of his chest. (T. 789). The pathologist further noted that there were scrapes and lacerations on the victim's arms and legs, and an apparent injury to his right thigh, which could have been grazed by a bullet. (T. 788-789).

A ballistics expert testified that the bullet that wounded Michael Cooper could have been fired from a .38 special revolver or a .357 magnum. (T. 1291). The bullet from McPhail's body was of the same type and was possibly fired from the same weapon as used in the Cooper shooting. (T. 1292). Four .38 special casings recovered at Cloverdale where Michael Cooper was wounded, were fired from the same gun as casings found at the scene of Officer McPhail's murder. (T. 1292).

At trial, Kevin McQueen, who was at the Chatham City jail with Petitioner, testified that Petitioner told him there had been a party in Cloverdale on the night prior to the victim's murder; Petitioner had argued with some boys and there was an exchange of gunfire. (T. 1230-1231). Petitioner told McQueen he did some of the shooting. (T. 1231). After the party, Petitioner went to a girlfriend's house and intended to eat breakfast at Burger King. Petitioner stated that he was with a friend and they ran into a guy who "owed money to buy dope." (T. 1231). There was a fight, Officer McPhail appeared, and Petitioner shot him in the face. As Officer McPhail attempted to get up, Petitioner shot him again, because he was afraid McPhail had seen him that night at Cloverdale. (T. 1232). Petitioner also told McQueen that he was on his way out of town to Atlanta. (T. 1232).

Jeffrey Lapp testified that Petitioner told him he did the shooting at Burger King, but that it was self-defense. (T. 1249-1252). Mr. Lapp noted that Petitioner's street name was RAH, standing for "Rough As Hell." (T. 1257).

Red Coles identified Petitioner as the perpetrator of Officer McPhail's murder, as did numerous other eyewitnesses, including Harriet Murray, Dorothy Ferrell, Daryl Collins, Antoine Williams, Steven Sanders and Larry Young.

Petitioner testified at trial. Petitioner admitted that he was present at the scene of the shooting on the night in question, but denied that he was involved in the shooting of Cooper or the victim or the assault on Larry Young.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE FACT-SPECIFIC APPLICATION OF THIS COURT'S DECISION IN *SCHLUP V. DELO*, 513 U.S. 298 (1995), WHICH RESULTED IN PETITIONER'S SUBSTANTIVE CLAIMS FOR RELIEF BEING REVIEWED BY THE FEDERAL COURTS, PRESENTS NO ISSUE WARRANTING THIS COURT'S EXERCISE OF ITS CERTIORARI JURISDICTION.

A. Petitioner cannot complain that no court has considered his "substantive actual innocence" claim, when the Eleventh Circuit expressly stated that Petitioner "does not make a substantive claim of actual innocence."

Petitioner's initial assertion in his "question presented" that "no court has examined Petitioner Troy Davis' compelling new evidence to determine if he is innocent," stands in stark contrast to the Eleventh Circuit's unequivocal

statement that, "In this case, Davis does not make a substantive claim of actual innocence." *Davis v. Terry*, 465 F.3d 1249, 1251 (11th Cir. 2006).

Therefore, assuming *arguendo*, that Petitioner is now raising a substantive actual innocence claim, there is no factual predicate for his assertion that the lower courts refused to consider a substantive "actual innocence" claim which Petitioner failed to raise in those proceedings.

This Court has stated in such cases as *Kentucky v. Stincer*, 482 U.S. 730, 747 (1987), citing *Heckler v. Campbell*, 461 U.S. 458, 468-469, n. 12 (1983), that it will not consider grounds which were not presented to the court below, except "in exceptional cases." An examination of the procedural history of Petitioner's case clearly establishes that Petitioner had every opportunity to allege a substantive actual innocence claim, but chose instead to rely on an assertion of "actual innocence" to attempt to excuse his procedural default of various constitutional claims for relief. Therefore, assuming, but in no way conceding, that Petitioner is now raising a substantive "actual innocence" claim, Petitioner has presented no "exceptional" circumstances which would authorize this Court to review a substantive "actual innocence" claim when such a claim was not presented to the federal habeas corpus court, or to the Eleventh Circuit Court of Appeals.

This Court should decline to grant certiorari as to any substantive "actual innocence" claim being raised for the first time in the instant petition for a writ of certiorari.

B. The federal courts applied this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), in a manner benefiting Petitioner and their fact-specific application of *Schlup* presents no issue warranting review by this Court.

Petitioner claims that the federal habeas corpus court, "skipped" the innocence gateway inquiry of *Schlup v. Delo*, 513 U.S. 298 (1995), allegedly to "avoid its role as fact finder" in what Petitioner asserts is a "substantial innocence" case. However, as just noted, Petitioner did not raise a substantive innocence claim in the lower courts, but rather attempted to excuse his procedural default of his constitutional claims by making the required "innocence" showing.

In affirming the denial of federal habeas corpus relief to Petitioner, the Eleventh Circuit noted that Petitioner contended "that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence under *Schlup*." *Davis v. Terry*, 465 F.3d 1249, 1252 (11th Cir. 2006).[11] *See also*, order of the federal habeas corpus court of 5/13/04, p. 65 (finding that "the state habeas court's reading of this claim as an argument made to support application of the miscarriage of justice exception was a fair assessment of Petitioner's position".)

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[11] Schlup, like Petitioner, raised an "actual innocence" claim, in an attempt to obtain review of an ineffective assistance claim and a *Brady* claim. *Schlup v. Delo*, 513 U.S. 298, 315 (1995). Both Schlup and Petitioner, attempted to meet the miscarriage of justice standard by establishing "actual innocence," as they were unable to establish the requisite cause and prejudice.

In the decision of the federal habeas corpus court reviewed on appeal by the Eleventh Circuit, the habeas court clearly relied on this Court's decision in *Schlup* in reviewing Petitioner's "actual innocence" claim. The federal habeas corpus court applied *Schlup* by concluding as follows:

> As explained above, a federal court looks, under the miscarriage of justice exception, to colorable claims of actual innocence for "*permission*" to address questions of constitutional impropriety asserted in procedurally defaulted claims. *See Schlup*, 513 U.S. at 315-16; *see also Brown*, 229 F. Supp. 2d at 1362. If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" gateway need not be implemented. *See Schlup*, 513 U.S. at 316. Ultimately, the state habeas court's analysis serves as assurance that no constitutional deficiencies exist in this case so as to merit habeas corpus relief.

(Federal Habeas Court Order of 5/13/04, denying relief, p. 65).

Contrary to Petitioner's contention, it is apparent from the specific language of the federal habeas corpus court's opinion, that the federal habeas corpus court clearly acknowledged the gateway provision of *Schlup v. Delo*. However, having made that acknowledgement of *Schlup*'s gateway function, the federal habeas court chose to rely on the provision of *Schlup* which expressly permits bypassing the gateway provision, if the reviewing court is "satisfied that no constitutional error occurred." *See Schlup v. Delo*, 513 U.S. at 316.

As properly found by the Eleventh Circuit, Petitioner did not identify a fatal flaw in the federal habeas court's *Schlup* analysis. In fact, an examination of the federal habeas court's opinion demonstrates that the federal habeas court went further than *Schlup* requires in analyzing Petitioner's claims, in light of Petitioner's failure to make a colorable showing of innocence. The federal habeas court simply assumed that the requisite colorable showing of innocence had been made and reviewed the "merits" of the constitutional claims raised by Petitioner, even though the state habeas corpus court had found the claims to be procedurally defaulted.[12]

The Eleventh Circuit also properly applied *Schlup* in rejecting Petitioner's claim that the federal habeas corpus court had "erred in declining to consider evidence of his actual innocence and instead, reached the merits of his constitutional claims." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006).

The Eleventh Circuit found that it was essentially irrelevant whether the federal habeas court had improperly declined to utilize *Schlup*'s gateway provision to obtain review of his constitutional claims, as the federal habeas court had proceeded to conduct a "merits" review of Petitioner's procedurally defaulted constitutional claims. The Eleventh Circuit properly found the following:

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[12] The state habeas corpus court denied relief by finding all of Petitioner's claims "are procedurally barred by having been raised and litigated at trial and on appeal or by having been waived, with the exception of the claim that his attorneys provided ineffective assistance at the motion for new trial and appellate stages." (State habeas corpus court denying relief, p. 43).

> As noted above, the procedural claim of actual innocence under *Schlup* is permitted in order to assure consideration of constitutional claims of an unfair trial where those claims have been procedurally defaulted. Davis received precisely such substantive consideration. *He cannot be heard to complain that the test for achieving a desired result was not applied, or not applied correctly, when the desired result was, in fact, obtained.*

Davis v. Terry, 465 F.3d 1249, 1253 (11th Cir. 2006) (emphasis supplied).

Petitioner obtained the desired "merits" review of his claims, and has no basis for criticizing the manner in which the federal habeas court determined that such a substantive review of the claims would be made. Thus, there is no case or controversy to be resolved by this Court, as the Eleventh Circuit properly found that the federal habeas corpus court reviewed Petitioner's "actual innocence" claims pursuant to *Schlup* and Petitioner received the substantive review of his procedurally defaulted claims which he sought to obtain by alleging "actual innocence."

The lack of the availability of further relief to this Petitioner is demonstrated by the fact that if a reviewing court should find that the gateway provision of *Schlup* was not properly utilized by the federal habeas corpus court in Petitioner's case, the only relief which Petitioner could obtain would be to receive a review of his constitutional claims on their merits, which is exactly the same review which was conducted by the federal habeas corpus court.

Additionally, Petitioner's allegation that "no court has examined Petitioner Troy Davis' compelling new evidence

to determine if he is innocent," is belied by the clear language of various orders of the federal habeas court. In an order denying Petitioner's motion for an evidentiary hearing, the federal habeas corpus court extensively reviewed each affidavit proffered during the state habeas corpus proceedings and where applicable, compared the affiant's testimony to any testimony which was given during Petitioner's trial, as well as whether the affiant had previously provided an affidavit. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, pp. 5-22).[13]

The federal habeas court examined the post-trial affidavits relied upon by Petitioner, which he asserts have never been "examined" and held the following: "the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim." (Federal Habeas Court Order of 5/13/04, denying relief, p. 25).

C. This case does not constitute the proper vehicle to revisit *Schlup*'s "gateway" provisions.

Assuming that this Court decides to revisit *Schlup*, this case does not represent the proper vehicle for reviewing *Schlup*'s gateway provision, as the gateway provision was not utilized by the federal courts to authorize a substantive review of Petitioner's procedurally defaulted

[13] As the federal habeas court noted, with the exception of attorney testimony, all of the "actual innocence" testimony offered by Petitioner during state habeas corpus proceedings was in affidavit form. (Federal Habeas Court Order of 3/10/03, denying evidentiary hearing, p. 39).

claims. As already noted, this Court in *Schlup*, specifically authorized bypassing the gateway provision if the reviewing court found that, "If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" gateway need not be implemented." *Schlup*, 513 U.S. at 316.

Petitioner's case constitutes a fact-specific application of *Schlup*, where Petitioner is not alleging a substantive "actual innocence" claim, but is merely asserting innocence as a means to obtain a substantive review of other claims. *Schlup*'s provisions were properly applied by the federal habeas corpus court in light of Petitioner's allegations and post-trial affidavits.[14]

The fact that *Schlup*'s gateway provisions might be applied differently in future cases in which a petitioner may be alleging substantive actual innocence claims, is mere speculation and does not bear on the instant case before the Court nor warrant this Court's exercise of its certiorari jurisdiction.[15] *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) ("The legal problem must be "beyond the academic or the episodic.")

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[14] Insofar as Petitioner's petition for certiorari represents Petitioner's disagreement with the federal habeas court's review of his post-trial affidavits as not presenting "compelling evidence" of his innocence, this disagreement fails to warrant this Court's certiorari review. This Court has repeatedly stated that, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925) and *Texas v. Mead*, 465 U.S. 1041 (1984).

[15] *See Nike, Inc. v. Kasky*, 539 U.S. 654, 663 (2003) ("the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. (citations omitted).")

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari.

Respectfully submitted,

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(4)

NO. 06-1407

In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

WILLIAM TERRY, Warden, Georgia Diagnostics Prison

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner Troy Davis respectfully petitions this Court to grant certiorari and consider whether habeas courts may bypass the "gateway" innocence issue in cases with substantial evidence of innocence or remand to the Court of Appeals with direction to reconsider in light of this Court's decisions in *House v. Bell*, 126 S.Ct. 2064 (2006) *and Schlup v. Delo*, 513 U.S. 298, 315 (1995). Respondent mischaracterizes Petitioner's argument, the Eleventh Circuit's opinion and the district court opinion.

1. Petitioner claims that review of his substantial evidence of innocence is required and necessary to understand the merits of his constitutional claims. Petitioner's use of the adjective "substantial" to describe his innocence evidence does not alter the nature of his innocence claim. In *Schlup v. Delo*, this Court described two distinct types of innocence claims: the "novel substantive constitutional claim" asserted in *Herrera v. Collins*, 506 U.S. 390 (1993) and a "procedural" claim presented in *Schlup*. In *Herrera*-type substantive claims, innocence alone provides a theoretical constitutional basis for habeas relief. In *Schlup*-type procedural claims, innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315.

Petitioner has asserted a *Schlup*-type "procedural" innocence claim and has never raised -- as Respondent argues -- a *Herrera*-type substantive claim. Thus, the Eleventh Circuit correctly stated that "Davis does not make a [*Herrera-type*] substantive claim of actual innocence." Respondent's

claim that the above statement means that the Eleventh Circuit considered Petitioner's innocence evidence and found it insubstantial is a blatant mischaracterization. Further, Respondent's argument that Petitioner has raised a *Herrera*-type claim for the first time in his Petition for Certiorari is equally wrong. Petitioner has argued that his *substantial* evidence of innocence sheds light and gives context to the review of his underlying constitutional claim, thus the courts below should not have bypassed the innocence question. Respondent's substitution of the word "substantive" for Petitioner's use of the word "substantial" is a mischaracterization of Petitioner's argument.

2. No court has ever examined the full panoply of new evidence to determine if Mr. Davis is innocent. Respondent argues that Petitioner's claim that the district court ignored his gateway innocence claim is "unfounded" because the court "reviewed each affidavit proffered *during the state habeas corpus* proceeding." (emphasis added). Respondent fails to point out that the district court refused to consider the bulk of Petitioner's innocence evidence -- affidavits proffered for the first time *in federal court*. Although the district court admitted into the record six affidavits that Petitioner proffered in his state habeas proceeding, the court declined to consider any of the affidavits Petitioner proffered in federal court -- the lion's share of Petitioner's innocence claim -- because it found that they were procedurally barred by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Appendix A at 37. The court concluded that it need not evaluate any of Petitioner's innocence evidence introduced for the first time in federal court because AEDPA precluded an evidentiary hearing "even if" Petitioner could prove his innocence. Appendix A at 30a, 33a, 36a, 37a.

This Court has repeatedly and consistently held that a petitioner's claim of actual innocence must be examined "in light of all the evidence."[1] The evidence that the district court refused to evaluate included: (1) the affidavit of a witness who saw Red Coles shoot Officer McPhail, (2) the testimony of two witnesses who swore that Red Coles confessed to shooting McPhail, (3) the recantation of prosecution witness Dorothy Ferrell, (4) the testimony of prosecution witness Harriet Murray that implicates Red Coles as the shooter, (5) the recantation of prosecution witness and victim Larry Young, (6) the recantation of prosecution witness Antoine Williams, (7) the recantation of prosecution witness D.D. Collins, (8) the recantation of prosecution witness Benjamin Gordon and (9) the recantation of prosecution witness Jeffery Sapp.

In *House v. Bell*, the habeas petitioner asserted his innocence as a gateway to consideration of his defaulted constitutional claims of ineffective assistance of counsel and prosecutorial misconduct. 126 S.Ct. 2064, 2075 (2006). This Court reversed the district court because the court "did not clearly apply *Schlup*'s predictive standard" to the petitioner's innocence evidence. *Id.* at 2078. Here, the district court's mere summary of a portion of the affidavits and its subsequent refusal to consider the lion's share of Petitioner's innocence evidence as part of the record does not, as the Respondent asserts, constitute a determination of whether "in light of all the evidence" Mr. Davis is innocent. *Id.* at 2078. Thus, Petitioner has requested that the Court grant certiorari

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[1] *House v. Bell*, 126 S. Ct. 2064, 2077 (2006); *Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Schlup*, 513 U.S. at 327-328; *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Sawyer v. Whitley*, 505 U.S. 333, 339 n. 5 (1992); *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n. 17 (1986) (plurality).

to determine whether a habeas court can avoid its fact-finding function by skipping the gateway innocence question.

3. Respondent's argument that this Court in *Schlup* "expressly permit[ed] bypassing the gateway provision if the reviewing court is satisfied that no constitutional error occurred" frames an important controversy warranting the grant of certiorari. Respondent and the district court cite the same pages of this Court's opinion in *Schlup* for two contradictory propositions, namely that (1) that the court must in the first instance look to colorable claims of actual innocence for "permission to address questions of constitutional impropriety," and yet, notwithstanding this initial "permission" hurdle, (2) the district court need not get permission to address procedurally-defaulted constitutional claims if it is "satisfied that no constitutional error occurred." (Petitioner's Supplemental Appendix at p. 66 (citing *Schlup*, 513 U.S. at 315-16)).

In fact, Respondent's quotation from *Schlup* cited on page 28 of its Brief in Opposition can be found nowhere in this Court's opinion in form or substance. Respondent writes:

> ... [T]his Court in *Schlup*, specifically authorized bypassing the gateway provision if the reviewing court found that, "*If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" [sic] gateway need not be implemented.*" *Schlup*. 513 U.S. at 316. (Respondent's Brief at 28).

Instead, Respondent's citation points to the following statement from this court:

> If a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner

> should be allowed to pass through the gateway and argue the merits of his underlying claims. *Schlup,* 513 U.S. at 316.

Recently, in *House* this court stated that "it bears repeating that the *Schlup* standard is demanding and permits review only in the extraordinary case." 126 S. Ct. at 2077. Petitioner argues that "gateway" innocence determination in a *Schlup*-type claim is necessary to this Court's prioritization of judicial resources. *Schlup's* innocence gateway was meant to serve as a screen to conserve judicial resources for "those who were truly deserving." *Schlup*, 513 U.S. at 321. Instead, the courts below reviewed Petitioner's claims without reference to whether his case was the "rare," "extraordinary case." *Id.* As a result, Petitioner received perfunctory review of his constitutional claims without the benefit of the fact finding and credibility assessments required to make a *Schlup* innocence gateway determination. If the lower court's decision is accepted, the truly "exceptional" innocence cases will be lumped together with non-meritorious masses, negating the interests of comity, finality and -- most importantly -- justice for the innocent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 4, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TROY ANTHONY DAVIS,	)	
	)	
Petitioner,	)	
	)	
	)	
v.	)	**CV 401-290**
	)	
	)	
FREDERICK HEAD, Warden,	)	
Georgia Diagnostic Prison,	)	
	)	
Respondent.	)	
	)	

ORDER

Before the Court is petitioner's motion for an evidentiary hearing (Doc. 38), respondent's response thereto (Doc. 39) an petitioner's reply (Doc. 41). Specifically, petitioner seeks an evidentiary hearing with respect to four of his seventeen claims in this federal habeas corpus action: Claim IV (state misconduct); Claim V (conflict of representation at motion for new trial and on appeal); Claim VI (ineffective assistance of counsel); and Claim VIII (petitioner's absence from critical stage of trial). Respondent has opposed petitioner's motion in its entirety. For the following reasons, the Court DENIES petitioner's motion for an evidentiary hearing (Doc. 38). As discussed herein, the Court also DENIES petitioner's request for oral argument on the instant motion (Doc. 42) and DENIES petitioner's motion for expert assistance (Doc. 28).

I. Background

On direct appeal, the Georgia Supreme Court described the factual background of this case as follows:

> At midnight on August 18, 1989, the victim, a police officer, reported for work as a security guard at the Greyhound bus station in Savannah, adjacent to a fast-food restaurant. As the restaurant was closing, a fight broke out in which Davis struck a man with a pistol. The victim, wearing his police uniform--including badge, shoulder patches, gun belt, .38 revolver and nightstick--ran to the scene of the disturbance. Davis fled. When the victim ordered him to halt, Davis turned around and shot the victim. The victim fell to the ground. Davis, smiling, walked up the stricken officer and shot him several more times. The officer's gun was still in his holster.
>
> The victim wore a bullet proof vest, but the vest did not cover his sides and the fatal bullet entered the left side of his chest, penetrated his left lung and aorta, and came to rest at the back of his chest cavity. The officer was also shot in the left check and the right leg.
>
> The next afternoon, Davis told a friend that he had been involved in an argument at the restaurant the previous evening and struck someone with a gun. He told the friend that when a police officer ran up, Davis shot him and that he went to the officer and "finished the job" because he knew the officer got a good look at his face when he shot him the first time.
>
> After his arrest, Davis told a cellmate a similar story.

Davis v. State, 263 Ga. 5, 5-6, 426 S.E.2d 844,846 (Ga. 1993).

The Court adds the following facts to place in context some of the evidence presented in support of petitioner's motion for an evidentiary hearing. The police officer who was killed was "Officer McPhail." On the night that Officer McPhail was killed, two other shootings occurred at a pool party in "Cloverdale." A young man named Michael Cooper was shot in the face while riding in a car in front of the party. Another young man named Sherman Coleman was shot by gunfire coming from the car. Petitioner, who was present at the Cloverdale party, was convicted of shooting Michael Cooper. The bullet removed from Michael Cooper's check was the same type of bullet used to shoot Officer McPhail, and allegedly came from the same gun.

Officer McPhail was shot in a part of town called "Yamacraw" outside of a Burger King. Officer McPhail was shot following an altercation between a man named Larry Young and petitioner, Sylvester ("Red") Coles and Darrell ("D.D.") Collins.

This Court previously has set forth the procedural background in this case as follows:

> Petitioner was indicted in Chatham County, Georgia on November 15, 1989 for the murder of Officer Mark Allen McPhail, obstruction of Officer McPhail, aggravated assault and possession of a firearm during the commission of a felony. Petitioner was tried by jury on August 19-30, 1991 and was found guilty on all counts. Petitioner was then sentenced to death for the murder of Officer McPhail. Petitioner filed several motions for new trial, which were denied in March of 1992. The Georgia Supreme Court affirmed petitioner's conviction and death sentence in 1993. See

Davis v. State, 263 Ga. 5, 426 S.E.2d 844 (1993).

On March 5, 1994, petitioner filed a petition for habeas corpus. At a status hearing on July 20, 1995, the court scheduled an evidentiary hearing for November 21, 1995. On August 28, 1995, petitioner's original counsel filed a notice of withdrawal and petitioner's new counsel moved to continue the November 21 hearing. On October 19, 1995, the habeas court denied the request for continuance. Petitioner then filed an interlocutory appeal. In an Order dated May 28, 1996, the Georgia Supreme Court reversed the habeas court's denial. See Davis v. Thomas, 266 Ga. 835, 471 S.E.2d 202 (Ga. 1996).

On November 6, 1996, petitioner filed an amended petition for habeas corpus, alleging fifteen claims for relief. On December 16, 1996, the state court held an evidentiary hearing. Unrestricted in the type of evidence he could present, petitioner presented five witnesses and thirty-three affidavits.

On September 9, 1997, the state court denied petitioner's state court petition for habeas corpus. The Georgia Supreme Court affirmed the denial of state habeas corpus relief on November 13, 2000. See Davis v. Turpin, 273 Ga. 244, 539 S.E.2d 129 (Ga. 2000). On December 15, 2000, the Georgia Supreme Court denied petitioner's motion for reconsideration. On October 1, 2001, the United States Supreme Court denied certiorari.

Petitioner then filed his federal habeas corpus petition on December 14, 2001.

Doc. 32 at 1-3.

II. Motion for an evidentiary hearing

Petitioner seeks an evidentiary hearing in order to "present evidence before this Court in support of the factual allegations" set forth in his petition for a writ of habeas corpus. Doc. 38 at 1. He contends that such a hearing is necessary because the evidence he offered at the state habeas corpus hearing, and additional evidence presented for the first time in this proceeding, raises a "convincing claim of innocence." See Doc. 41 at 1-2. As he has done at trial and during all subsequent state court proceedings, petitioner advances his theory that Sylvester "Red" Coles, and not petitioner, shot Officer McPhail. See Doc. 38 at 9.

Petitioner points to the following evidence as grounds for an evidentiary hearing:

A. Evidence presented during state court proceedings

At the state habeas evidentiary hearing, petitioner offered the following affidavits, which the state court agreed to take under consideration. See Davis v. Turpin, 94-v-162 December 16, 1996 H'rg Tr. At 81-99.[1]

1. Affidavit of Joseph Washington

At petitioner's trial, Joseph Washington testified that he saw Red Coles assault Larry Young and shoot Officer

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[1] The state court did not specifically refer to, and apparently did not rely on, any of these affidavits in ruling on petitioner's habeas corpus petition, as the state court found that the claims in support of which the affidavits had been offered were procedurally barred. See Davis v. Turpin, 94-v-162, Sept. 9, 1997 Order.

McPhail. At the state habeas corpus hearing, petitioner offered a December 6, 1996, affidavit in which Mr. Washington reiterated that he was positive that Red Coles shot Officer McPhail, and stated that Red Coles was wearing a white shirt with a batman print on it at the time of the shooting. See Doc. 38, App. 37. Petitioner did not call Mr. Washington to testify at the state habeas corpus hearing.

2. Affidavit of Tonya Johnson

At petitioner's trial, Tonya Johnson testified that on the night that Officer McPhail had been shot, she and her friend Anita Dunham were walking toward the Burger King when they were stopped by Red Coles and his friend Terry. Coles asked if he could walk with the two women. When the four of them approached the scene of the shooting, however, Coles did not want to go close to the scene. The group turned around and walked away, but Coles directed Ms. Johnson to return to the scene to see if the police were present. Ms. Johnson returned to the scene, asked the officers what had happened, and learned that an officer was dead. She then reported this information to Coles and Terry. Ms. Johnson further testified at trial that Coles was nervous from the moment she saw him that night. Finally, Ms. Johnson testified that she had seen Coles earlier that night at the Cloverdale party.

At the state habeas corpus hearing, petitioner offered a December 6, 1996, affidavit in which Ms. Johnson stated that when she saw Red and Terry that night, each of them had a gun. Red asked her to hold the guns, but Ms. Johnson refused. Red then took the guns to an empty house and put the guns to an empty house and put the guns inside a screen door. He told Ms. Johnson that he wanted to make sure that she did not tell the police about the guns. Ms. Johnson "did not testify about the guns at Troy's trial because she was afraid of what Red would do to [her] if [she] did." See Doc. 38, App. 43. Petitioner did not call Ms. Johnson to testify at the state habeas corpus hearing.

3. Affidavit of Kelvin McQueen

In October 1989, Chatham County inmate Kevin McQueen gave a statement to Savannah Police Detective Ramsey that petitioner had confessed to having shot Officer McPhail. At petitioner's trial, Mr. McQueen testified regarding such confession.

At the state habeas corpus hearing, petitioner offered a December 6, 1996 affidavit of Kevin McQueen in which Mr. McQueen said that petitioner never confessed to Officer McPhail's shooting, but rather that Mr. McQueen made up the story of petitioner's confession after a jailhouse altercation between petitioner and Mr. McQueen. See Doc. 38, App. 48. Petitioner did not call Mr. McQueen to testify at his state habeas corpus hearing.

4. Affidavit of Joseph Blige

In a pretrial statement, Joseph Blige stated that he, Michael Cooper, Lamar Brown, Mark Wilds and Benjamin Gordon were at the Cloverdale party on the night Officer McPhail was shot. When these five men were leaving the party in an automobile, four or five other men were behind some bushes, and one of them started shooting. Mr. Blige did not know how many of the men joined in the shooting, but "they shot at a steady pace." Michel Cooper was shot in the face.

In a December 1, 1995 affidavit, Mr. Blige said that when he was at the Cloverdale party, neither he nor any of the men he was with "had any words or any problem with Troy Davis." Mr. Blige further stated that when he and his friends were leaving the party, Michael Cooper yelled something out of the car window and the shooting started. Mr. Blige heard more than one weapon being fired. Mr. Blige believed that at least one of the weapons was "an automatic." The car was hit at least six times, and there were different sized bullet holes in the car. See Doc. 28, App. 49. Petitioner did not call Mr. Blige to testify at his state habeas corpus hearing.

5. Affidavit of April Hester

At the state habeas corpus hearing, petitioner offered a November 30, 1995, affidavit in which Ms. Hester stated that she was a hostess of the Cloverdale party on the night in question. She remembers that Red Coles was at this party and was drinking. Ms. Hester did not see him there after 10:00 p.m., because she want in back of the house and Red went around front. Some time after midnight, Mark Wilds, "Porky" and "some of the others" "started making trouble" and Ms. Hester asked them to leave. She went to the front of the house when they got in their car and left. A few minutes later, they drove by the house and Ms. Hester heard shots coming from the car. They drove by again, fired more shots, and shot Sherman Coleman.

When the police came to the party, Ms. Hester heard over an officer's walkie-talkie that an officer had been shot that night. The police left right away. Ms. Hester then drove to Yamacraw to see what had happened. She saw Red Coles speaking with Tonya Johnson and acting nervous and upset. That night, Ms. Hester was brought to the police station to answer questions about the shooting of Officer McPhail. The next day, the police asked Ms. Hester to give a statement about the shooting of Sherman Coleman. She did not learn until some time later that Michael Cooper also had been shot that night. See Doc. 38, App. 44. Petitioner did not call Ms. Hester to testify at the state habeas corpus hearing.[2]

6. Affidavit of Lamar Brown

At petitioner's state habeas corpus hearing, petitioner presented a November 2, 1995 affidavit of Lamar Brown. In this affidavit, Mr. Brown stated that he went to the Cloverdale party with Michael Cooper, Mark Wilds, Michael Wilds and Joseph Blige. Neither Mr. Brown nor the people he was with that night "had any kind of conflict or argument with Troy

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[2] As will be discussed below, Ms. Hester provided a subsequent affidavit on July 7, 2002. See Doc. 38, App. 45.

Davis at the party. None of us ever had any problem with Troy Davis." See Doc. 38, App. 50.

B. Evidence presented for first time in federal habeas proceeding

The following affidavits have been presented for the first time in the instant federal proceeding.

1. August 17, 2001 affidavit of Monty Holmes

Three days after Officer McPhail was shot, Monty Holmes told the police that petitioner had confessed to having shot a police officer in the chest. See Doc. 38, App. 22. At petitioner's preliminary hearing Mr. Holmes gave the same testimony. Mr. Holmes, however, did not testify at petitioner's trial.

Petitioner now offers an August 17, 2001 affidavit of Mr. Holmes, in which Mr. Holmes states that when the police first questioned him about Officer McPhail's shooting, he told them that he knew nothing about it. The police continued to question him, he was scared, and finally he said what they wanted to hear, that petitioner had confessed to having shot Officer McPhail. When Mr. Holmes went to court for the preliminary hearing, he felt compelled to repeat the substance of his statement, so he did. Mr. Holmes, however, did not want to testify at trial because petitioner had never confessed to him. Mr. Holmes therefore dodged a subpoena and did not testify at petitioner's trial. See Doc. 38, App. 23.

2. November 29, 2000 Affidavit of Dorothy Ferrell

On August 19, 1989, Dorothy Ferrell said that she had seen the man who shot Officer McPhail as she was coming down the steps of the Thunderbird Motel, and that she would recognize the shooter if she saw him again. See Doc. 38, App. 26.

On September 5, 1989, Ms. Ferrell identified petitioner as the person who had shot Officer McPhail. She

said that she had seen the shooting from about ten or fifteen feet away as she was coming down the steps of Thunderbird. See Doc. 38,App. 25.

At petitioner's trial, Ms. Ferrell testified that she had identified petitioner in a pre-trial photographic lineup. She identified petitioner in court as the man who had shot Officer McPhail. Defense counsel cross-examined Ms. Ferrell as to whether she could see the shooting from the Thunderbird stairwell, under poor lighting conditions. Defense counsel asserted at trial that Ms. Ferrell's testimony was unworthy of belief.

After the close of evidence but before closing arguments, the wife of petitioner's trial counsel received a call at home from a woman who identified herself as Ms. Ferrell. This woman stated that she had testified at petitioner's trial, and that a year earlier, someone from the District Attorney's office had come to see her when she was in jail. The woman said that she was told that this person from the District Attorney's office would help her if she would testify in petitioner's case. The woman said that everything she had testified to at petitioner's trial was a lie, and that she wanted petitioner's counsel to know that she had fabricated her testimony.

The next morning, petitioner's trial counsel moved for a continuance until Ms. Ferrell could be produced. The assistant district attorney then advised petitioner's counsel that he had received correspondence from Ms. Ferrell within the previous year. The assistant district attorney stated that he had written back that he was in no position to help Ms. Ferrell, but that he appreciated her courage and willingness to testify. The trial court then granted petitioner's motion for a continuance.

Ms. Ferrell was apprehended and brought into court. She denied having called trial counsel the night before and denied having anyone else make such a call on her behalf. Ms. Ferrell further testified that she believed the prosecutor would help her because she was a witness in petitioner's case.

The state then proffered testimony that the district attorney had not promised Ms. Ferrell anything and did not, in fact, assist her. Petitioner's counsel moved for a mistrial, but chose not to recall Ms. Ferrell to the stand.

Petitioner now presents a November 29, 2000, affidavit of Ms. Ferrell in which Ms. Ferrell states that she did not see who shot Officer McPhail, she just heard the gunshots while she was in the stairwell of the Thunderbird Motel. By the time she exited the stairwell, the shooting had stopped and more than two people were running away. She said that on the night of the shooting, she was brought into the police station for questioning and told that she could not leave until she made a statement. She felt as if the police wanted her to say that she had seen the shooting and to sign a statement, so that is what she did. A little while later, a police detective showed Ms. Ferrell a picture of petitioner and told her that other witnesses had identified petitioner as the shooter. Ms. Ferrell told the detective that petitioner was the shooter, even though she had not seen who the shooter was. At trial, she repeated what she had said in her earlier statements to the police.

Ms. Ferrell said that she did not make the phone call to defense counsel's home during petitioner's trial, but a friend of hers did. Ms. Ferrell also said that she did not see petitioner in the courtroom during her second trial appearance when she was asked about the phone call. See Doc. 38, App. 27.

3. 2002 unsworn affidavit of Harriett Murray

In an August 19, 1989 police statement, Harriett Murray stated that she sent Larry Young out to get cigarettes and beer, and that when Larry returned, "one guy" was "fussing at [Larry]" and then two more came up from a nearby bank. "One of the guys said" said, "You don't know me, don't walk away from me, I'll shoot you," and started digging into his shirt and pulling out a gun. Larry Young kept walking away and "they hit Larry in front of the van" in

the Burger King drive-through. Officer McPhail came running out and the guy with the gun shot Officer McPhail several times. Ms. Murray decsribed the man with the gun as having "a narrow face, with high cheekbones, medium-skinned, with a white shirt," dark-colored pants, a fade-away haircut, between 24 an 30 years old, 130 pounds, and four inches taller than Officer McPhail. See Doc. 38, App. 4.

In an August 24, 1989 police statement, Ms. Murray identified Red Coles as one of the men present at the incident but not as the shooter.

At a preliminary hearing, Ms. Murray identified petitioner as a person who was "at the police shooting." At trial, Ms. Murray testified that the man in the white shirt hit Larry in the head with a gun and shot Officer McPhail. She testified that petitioner "looked like the guy that had hit Larry and shot the police." Trial Tr. at 865.

Petitioner now presents an unsworn affidavit of Ms. Murray, purportedly dated October 14, 2002,[3] in which Ms. Murray states that the man following Larry started digging in his pants for a gun and slapped Larry on the side of the face with the gun. Ms. Murray then ran to the Burger King for help. She saw the man who was arguing with Larry shoot the police officer. See, Doc. 28, App. 29.

4. October 11, 2002 affidavit of Larry Young

In an August 19, 1989 police statement, Larry Young stated that when he was returning from the liquor store with beer, "a guy" started picking on him and asking him for a beer. Two more men than approached. The three men cornered Mr. Young. Mr. Young was paying attention to the

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[3] A Georgia Resource Center attorney and paralegal have stated in sworn affidavits that they presented Ms. Murray's affidavit to Ms. Murray on October 14, 2002, and that she read it, acknowledged its accuracy, and signed it, but did not have time to have it notarized. See Doc. 38, Apps. 30, 31.

man who had been picking on him. One of these three men (Mr. Young was not certain which one) hit Mr. Young, and Mr. Young ran to the Burger King looking for help. Mr. Young did not see the shooting of the police officer. Mr. Young described one of the men as wearing a white t-shirt with a print on it and a white hat. He described another of the men as wearing a yellow tank top, about 20-21 years old, with short hair, about 5'9", 158 pounds, with no facial hair. He thought that the man in the yellow tank top was the one that was "constantly on" him. See Doc. 38, App. 5.

At a preliminary hearing, Mr. Young testified that his attention had been focused on the man who was picking on him. Mr. Young also testified that he couldn't see too much because the light was in his face and he had already consumed seven or eight beers that night.

At petitioner's trial, Larry Young testified that he did not know who had assaulted him, and that he couldn't get a good look at the men who were not arguing with him.

Petitioner now presents an October 11, 2005 affidavit of Mr. Young in which Mr. Young said that after Officer McPhail had been shot, other police officers treated him like a criminal and would not treat his injuries. Mr. Young told the police officers that he did not know what anyone looked like or who did what. The police kept pressing Mr. Young for answers. The police suggested answers and Mr. Young gave the police what they wanted and signed the typed papers that they gave to him without reading them. Mr. Young never has been able to make sense of what happened that night. See Doc. 38, App. 32.

5. October 12, 2002 affidavit of Antione Williams

In an August 19, 1989 police statement, Antione Williams stated that, from his car in the Burger King parking lot, he had seen three men following one man. The man with the gun then slapped the one man across the head with the gun. The man with the gun was trying to get to the gun back into his pants, but could not, and he shot the police officer.

The other two men ran off. Mr. Williams said that he did not know if he could identify the shooter. See Doc. 38, App. 6.

In an August 30, 1989 police statement, Antione Williams stated that he was sixty percent sure that petitioner was the person who shot Officer McPhail. Mr. Williams also said that the man who did the shooting was the same man that slapped Larry Young in the head with the gun. See Doc. 38, Ap. 33.

At petitioner's trial, Mr. Williams identified petitioner in open court as the person who shot Officer McPhail.

Petitioner now presents an October 12, 2002 affidavit of Mr. Williams in which Mr. Williams said that when he saw the officer go down, he couldn't really tell what was going on due to the tint of the windows in his car. When police officers questioned Mr. Williams on the night of the shooting, Mr. Williams said that he did not know what had happened and could not identify with any certainty who had shot Officer McPhail. Mr. Williams signed the statement that the police officers gave him, even though he cannot read.[4] When Mr. Williams identified petitioner as the shooter at petitioner's trial, Mr. Williams was "totally uncertain" as to whether petitioner was the one who had shot the officer. Mr. Williams has no idea what the person who shot Officer McPhail looks like. See Doc. 38, App. 34, Ex. A.

6. August 8, 2001 affidavit of Anthony Hargrove

Petitioner presents an August 8, 2001 affidavit of Anthony Hargrove in which Mr. Hargrove stated that Red Coles once told him "that [Red] shot a police officer and that a guy named Davis took the fall for it." See Doc. 38, Appendix 41.

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[4] An attorney and paralegal for the Georgia Resource Center read the October 12, 2002 affidavit to Mr. Williams before he signed it. See Doc. 38, Apps. 34, 35.

7. August 18, 2001 affidavit of Shirley Riley

Shirley Riley stated in an August 18, 2001 affidavit that Red Coles told her that he shot the police officer in 1989 but it was an accident. Ms. Riley further stated, "Maybe Sylvester was just trying to impress me. I don't know for sure who actually shot the officer." See Doc. 38, App. 40.

8. August 20, 2001 affidavit of Darold Taylor

Darold Taylor stated in an August 20, 2001 affidavit that after hearing rumors that Red Coles had shot Officer McPhail, he raised the issue with Red:

> One day when I was in the parking lot of Yamacraw drinking beers with Red, I told him about how I'd heard that he was the one who killed the officer. Red told me to stay out of his business. I asked him again if he killed the officer and Red admitted to me that he was the one who killed the officer, but then Red told me again to stay out of his business. He sounded like he was starting to get mad. I didn't ask him anything more about it then and I never brought it up with him after that.

Doc. 28, App. 42.

9. August 17, 2001 affidavit of Gary Hargrove

Gary Hargrove stated in an August 21, 2001, affidavit that he was at the Burger King the night that Officer McPhail got shot. He heard a shot, looked "where the one shot came from," and saw a guy who "looked like Troy Davis" running away. He heard another shot and saw that the guy who was still standing near the police officer "was a guy whose nickname is Red." See Doc. 38, App. 39.

10. October 8, 2002 Affidavit of Abdus-Salam Karim

Abdus-Salam Karim stated in an October 8, 2002, affidavit that he told Red Coles that hew as Troy Davis's cousin and that he had heard what red had been saying about Troy. Red said that Troy had not done anything and that Red had lied to the police when Red told the police "that Troy did it." Red further said that he would tell the truth to the police, that Troy "didn't do anything." See Doc. 38, App. 38.

11. July 10, 2002 Affidavit of Anita Dunham Saddler

In a July 10, 2002 affidavit, Ms. Dunham Saddler stated that when she saw Red Coles and his friend Terry on the night Officer McPhail had been shot, Red and Terry were jumpy, nervous, fidgety and shifty-eyed. Red had a gun stuck into his shorts and was wearing a white shirt. When Tonya Johnson told Red that the police officer had been shot and might be dead, it appeared to Ms. Dunham Saddler that Red knew exactly what had happened. See Doc. 38, App. 46.

12. July 7, 2002 Affidavit of April Hester Hutchinson

In a July 7, 2002 affidavit, April Hester Hutchinson stated that while everything she said in her 1995 affidavit had been correct, she had not mentioned everything she had known about the night that Officer McPhail got shot because she was still scared of Red Coles. She elaborated on her earlier affidavit by stating that when she saw Red Coles speaking with Tonya Johnson on the night Officer McPhail had been shot, she walked up to Red and Tonya. Tonya walked away, and Red asked April to walk with him up to the Burger King so "they won't think that I had nothing to do with it." Ms. Hester started walking with Red, but her mother called for her to come back. Ms. Hester told Red that she had to go, and Red glared at her and told her not to tell anyone

what he had said. Ms. Hester tried to stay away from Red Coles after that time.

When Ms. Hester was brought to the police station on the night of Officer McPhail's shooting, Ms. Hester said that she had seen Red Coles and he had appeared "real nervous," but she did not mention what Red had said to her because she was scared. She did, however, tell her mother later that night about Red's statements. See Doc. 38, App. 45.

13. July 11, 2002 Affidavit of Peggie Grant

In a July 11, 2002, Ms. Grant, the mother of April Hester Hutchinson, stated that on the night that Officer McPhail got killed, she was at her home in Yamacraw and heard the gun shots. She went outside "sometime later" and saw April walking with Red Coles. Red was wearing a white t-shirt. She yelled at April to come back to the house. April then left Yamacraw to go Cloverdale. A few hours later, April called Ms. Grant and said that Red Coles had asked her to walk up to where Officer McPhail had been shot so that the police would think that Red was with her. April also said that after Ms. Grant had called April back to the house, Red had given her a mean look and told her not to say anything about what he had said. See Doc. 38, App. 47.

14. July 11, 2002 Affidavit of Darrell ("D.D.") Collins

On the night that Officer McPhail was shot, D.D. Collins told the police that he had seen petitioner shoot at the people in the car leaving the Cloverdale party. He stated that petitioner used a black gun with a brown handle and a short barrel. Mr. Collins stated that later that night, petitioner and Red Coles were in the Burger King parking lot speaking with a man, and petitioner slapped the man in the head and a police officer came out. When Mr. Collins saw the police officer, he ran to his car and went home. See Doc. 38, App. 20.

At trial, Mr. Collins testified that he did not actually see who fired the shots at the Cloverdale party. He testified

that when he had told the police officers that petitioner had shot at the car, he did so only because he was sixteen years old and the police had been pressuring him. Mr. Collins also testified at trial that after the Cloverdale party, he went to a pool hall. He saw Red Coles with a gun. Red tried to put the gun in Eric Ellison's car, but Mr. Collins moved the gun to the end of the pool hall building because he and Eric Ellison did not want the gun in the car. Red Coles saw where Mr. Collins put the gun. Red Coles was the only person that Mr. Collins saw with a gun that night.

Mr. Collins testified that he saw petitioner slap a man outside the Burger King, but that he did not see petitioner with a gun that night. Mr. Collins testified that when the police officers had questioned him following the shooting, one officer said that if Mr. Collins did not cooperate, he would be imprisoned for ten to twelve years. Mr. Collins testified that he identified petitioner as the shooter in Cloverdale because the police detective asked Mr. Collins if he knew any of the people in the photographs.

Petitioner now presents a July 11, 2002 affidavit in which Mr. Collins stated that he went with petitioner to the Cloverdale party and did not see who fired the gun shots at the party. Mr. Collins also repeated his testimony that he did not see petitioner with a gun that night, Red Coles had a gun at the pool hall, and Red Coles saw Mr. Collins hide the gun in some bushes near the pool hall. Mr. Collins, petitioner and a few other people entered the pool hall, but Red stayed outside and was arguing with a man about beer. Mr. Collins thought that Red was about to get into a fight.

Mr. Collins went into the pool hall, told petitioner that there was going to be a fight, and came back outside with petitioner. Mr. Collins and petitioner started walking behind Red and the man Red was threatening. Mr. Collins then took off running. Mr. Collins did not see petitioner slap the man Red was arguing with. Mr. Collins heard gunshots as he was running away, and left the pool hall.

The next day, many police officers came to Mr. Collins's home and said that they knew that he had been there when the officer had been killed. The police officers took Mr. Collins in for questioning and started yelling at him and telling him that he knew petitioner had fired the shots in Cloverdale and killed Officer McPhail. Mr. Collins said that he did not know that and that he hadn't seen petitioner do anything. The police officers then started telling Mr. Collins that they were going to send him to jail as an accessory. After a couple of hours, Mr. Collins "finally broke down and told them what they wanted to hear." He signed a statement prepared by the police without reading it.

A week later, the police officers questioned Mr. Collins again and gave him another typed statement. Mr. Collins signed that statement without reading it.

Mr. Collins never saw petitioner hit the man that Red was arguing with that night. Mr. Collins lied at trial when he said he had seen petitioner hit him. Mr. Collins did not see who had fired the shots at the Cloverdale party. He testified truthfully when he said as much at petitioner's trial. See Doc. 38, App. 21.

15. September 19, 2002 affidavit of Mary Elizabeth Wells

Petitioner presents a September 19, 2002 affidavit of Mary Elizabeth Wells, a former attorney of the Georgia Resource Center who worked on petitioner's state habeas corpus petition. In her affidavit, Ms. Wells discusses the fact that the Resource Center lost seventy percent of its funding in 1995, and discusses the effect of such de-funding on the Resource Center's ability to handle its caseload, including petitioner's state habeas corpus case.

Ms. Wells stated that, prior to petitioner's state habeas corpus evidentiary hearing, there were numerous witnesses which the Resource Center had not interviewed, but knew it should have, including the affiants of petitioner's newly presented affidavits. She stated the Resource Center had received information in the mid 1990's that Red Coles had

made incriminating statements about his role in Officer McPhail's murder. She admitted that "although we raised all the claims present from the record, we were unable, despite our reasonable attempts to do so, to develop the facts that we believed could be developed through a reasonable investigation." She stated that the information presented in petitioner's newly offered affidavits was available at the time of petitioner's trial. See Doc. 38, App. 58 at 20 ("I have had an opportunity to review affidavits gathered by Mr. Davis' counsel after I left the Resource Center and withdrew from the case. The information contained in these affidavits dealing with manufactured testimony on the part of State witnesses, additional information incriminating Sylvester Coles, and evidence otherwise pointing to Mr. Davis' innocence and/or other mitigating factors is precisely the information I believed was available to support Mr. Davis' constitutional claims for relief-and which was available at the time of Mr. Davis' trial.").

III. AEDPA Standard

The instant petition, filed on December 14, 2001, is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). In passing the AEDPA, Congress "modified the discretion afforded to the district court and erected additional barriers limiting a habeas petitioner's right to discovery or an evidentiary hearing." Isaacs v. Head, 300 F.3d 1232, 1248-49 (11th Cir. 2002). One purpose of the AEDPA "has been to simplify and speed the federal habeas process." Breedlove v. Moore, 279 F.3d 952, 959 (11th Cir. 2002).

> Section 2254(e)(2) of the AEDPA states:
> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Pursuant to § 2254(e)(2), a petitioner's "failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Michael Williams v. Taylor, 529 U.S. 420, 432, 120 S.Ct. 1479, 1488, 146 L.Ed.2d 435 (2000).

> As recently explained by the Eleventh Circuit:
> The Supreme Court interpreted § 2254(e)(2) in its opinion in Michael Williams v. Taylor, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The Court considered whether the "failed to develop" language in the opening clause of the provision indicates that the § 2254(e)(2) bar is only applicable when a habeas petitioner has not been sufficiently diligent in his efforts to develop a record in state courts. The Court concluded that this language imported a "threshold standard of diligence," such that the discovery provisions of § 2254(e)(2) only apply if the petitioner was not reasonably diligent in trying to develop the

> factual record while in state court. Id. at 433-34, 120 S.Ct. at 1489. The Court held that "[d]iligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of information available at the time, to investigate and pursue claims in state court." Id. at 435, 120 S.Ct. at 1490. The applicability of the provision is not dependent on "whether those efforts could have been successful." Id. See also Breedlove v. Moore, 279 F.3d 952, 959-60 (11th Cir. 2002) (discussing Michael Williams and application of § 2254(e)(2)).
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> After discussing the meaning of § 2254(e)(2), the Supreme Court went on to find that an evidentiary hearing was not required with respect to the claims of which Williams was on notice while in state court, but that discovery was required as to a claim of juror and prosecutorial misconduct of which the petitioner had no reason to know while in state courts. Michael Williams, 529 U.S. at 438-445, 120 S.Ct. at 1491-94.

Isaacs, 300 F.3d at 1248. Accordingly, to determine whether a petitioner has "failed to develop the factual basis of [his] claim "in the state court proceedings, the Court first must ask "whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." Michael Williams, 529 U.S. 420, 431, 120 S.Ct. 1479, 1487. If the answer is "no," the Court next considers whether the petitioner made a reasonable attempt, in light of information available at the time, to investigate and pursue his claims in state court. Michael Williams, 529 U.S. 420, 435, 120 S.Ct. 1479, 1490.

If a petitioner's claim is based on evidence that existed at the time of the state court's evidentiary hearing, and any lack of evidence "stems directly from [the petitioner's] failure to diligently develop it, [the petitioner's claim] claim does not involve 'a factual predicate that could not have been previously discovered through the exercise of due diligence,'" and no hearing is necessary. Hall v. Head, 310 F.3d 683, 698 (11th Cir. 2002) (affirming denial of evidentiary hearing when: federal habeas corpus petitioner was afforded an evidentiary hearing in his state habeas corpus proceeding; his counsel had "plenty of time and opportunity to prepare for the state habeas corpus hearing"; and the state habeas court afforded petitioner ample opportunity to develop evidence at the day-long state hearing); see also Isaacs, 300 F.3d at 1249-50 (affirming denial of evidentiary hearing to federal habeas corpus petitioner who sought a hearing in order to reconstruct the prayer with which his trial began, when petitioner was allowed during state habeas corpus proceedings to "present evidence concerning the contents of the invocation . . . at which time he was able to question several of the relevant participants from his trial.").

Finally, even if a petitioner is able to meet the requirements of § 2254(e) as outlined above, a Court need not grant an evidentiary hearing if such a hearing would not assist in the resolution of petitioner's claim. Breedlove, 279 F.2d 952, 960 (citing Bolender v. Singletary, 16 F.3d 1547, 1555 n. 9 (11th Cir. 1994)).

IV. Analysis

A. Unconstitutional Conflict of Representation (Claim V)

In his federal habeas corpus petition, petitioner alleges that he was "denied a fair adversarial testing of his convictions and sentence when his attorney were forced into an actual conflict of interest in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Doc. 2 at 25. In particular, petitioner claims

that the fact that the trial court appointed "new counsel to raise the ineffectiveness of trial counsel while trial counsel was representing [petitioner] at the motion for new trial and on direct appeal created intractable conflicts and ethical dilemmas that hampered the effectiveness of both trial counsel and new counsel." Id. at 29. Petitioner believes that "he was denied the effective assistance of counsel at motion for new trial and on direct appeal as a result of an actual conflict of interest created by the trial court's dual appointment." Id. at 36.

Having thoroughly reviewed petitioner's motion for an evidentiary hearing along with all the evidence offered in support thereof, the Court concludes that none of petitioner's proffered evidence would affect the resolution of his conflict of interest claim.[5] Petitioner submitted a ninety-nine page memorandum in support of his motion for an evidentiary hearing. See Doc. 38. Nowhere in these ninety-nine pages does petitioner point to any evidence supporting the existence of a conflict of interest between his counsel. Rather, he refers to this claim only once, when he states, "[A]s for federal habeas claims Five and Eight, Mr. Davis contends that he should be allowed to present evidence on the claim that he was denied the effective assistance of counsel at motion for new trial and direct appeal because of an actual conflict of interest." Id. at 95. Similarly, none of the fifty-eight appendices to petitioner's motion present evidence relevant to petitioner's conflict of interest claim.

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[5] In his motion for an evidentiary hearing, petitioner did not specify which pieces of evidence supported a hearing with respect to which claim. See Doc. 38. Rather, petitioner discussed all of his evidence, and then contended that a hearing was warranted on all four claims. See id. Accordingly, the Court was forced to make an independent determination of which evidence was offered in support of which claim. As discussed above, none of the evidence presented was relevant to petitioner's conflict of interest claim.

Accordingly, the Court DENIES petitioner's motion for an evidentiary hearing with respect to his conflict of interest claim (Claim V). See Breedlove, 279 F.2d 952, 960 (although an evidentiary hearing would not be barred pursuant to § 2254(e)(2), it would still be appropriate to deny petitioner an evidentiary hearing "'if such a hearing would not assist in the resolution of this claim.'" (citing Bolender v. Singletary, 16 F.3d 1547, 1555 n. 9 (11th Cir. 1994) ("[N]o evidentiary hearing is necessary where the proffered evidence would not affect the resolution of the claim.")).

B. Unconstitutional Absence from Critical Stages (Claim VIII)

In his federal habeas corpus petition, petitioner alleges that his "absence from critical stages of the proceedings violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and prejudiced his right to a fair trial." Doc. 2 at 61. In particular, petitioner contends that he was not present when Dorothy Ferrell was recalled for questioning after the close of evidence but prior to closing arguments. Id.[6] As discussed above, Ms. Ferrell stated in her affidavit that she did not see petitioner in the courtroom during her second trial appearance in which she discussed the phone call to defense counsel's home the night before. See Doc. 38, App. 27. Because petitioner has pointed to evidence relevant to his "absence" claim, the Court now considers

[6] Petitioner also contends that he was not present at a pre-trial hearing determining whether his case would be bound over to the superior court for trial, and for many bench conferences. Id. at 65-66. Petitioner, however, has offered no evidence in support of his motion for an evidentiary hearing relevant to these two contentions. The Court therefore denies petitioner's motion with respect to these two contentions and considers only whether petitioner is entitled to a hearing on his claim that he was absent when Ms. Ferrell was recalled to testify. See Breedlove, 279 F.2d 952, 960.

petitioner's motion with respect to this claim pursuant to the AEDPA.

To determine whether petitioner has "failed to develop the factual basis of [his] claim" in the state court proceedings pursuant to AEDPA § 2254(e), the Court first must ask "whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." Michael Williams, 529 U.S. 420, 431, 120 S.Ct. 1479, 1487. Here the answer is no. At the state habeas corpus hearing, the only testimony offered with respect to petitioner's "absence" claim was the testimony of Mr. Falligant (one of petitioner's trial counsel) that, with the exception of the preliminary hearing, petitioner was always in the courtroom. Davis v. Turpin, 94-v-162, Dec. 16, 1999 Hr'g Tr. At 135, 179.[7] Accordingly, as found by the state habeas corpus, petitioner failed to establish a factual predicate for his claim that he was absent from Ms. Ferrell's second appearance during trial. See Davis v. Turpin, 94-v-162, Sept. 9, 1997 Order at 17.

The Court next considers whether petitioner made a reasonable attempt, in light of information available at the time, to investigate and pursue his claims in state court. Michael Williams, 529 U.S. 420, 435, 120 S.Ct. 1479, 1490. The Court concludes that petitioner did not. Petitioner was aware of his "absence" claims as soon as his alleged absence occurred-during trial. He had ample time and opportunity to develop such testimony or evidence as the evidentiary hearing occurred more than three and a half years after his original petition for habeas corpus and more than five years after trial. Petitioner had ample opportunity to present the factual basis

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[7] Petitioner relied only on the following court reporter notation on page 1481 of the trial transcript: "(Note: Court was in recess at 10:15 p.m. [sic], and at 2:20 p.m., the following transpired outside the presence of the jury, and with defendant not yet present in the courtroom as follows:)."

for his "absence" claim at the state court's evidentiary hearing, and yet failed to do so.

The Court therefore finds that petitioner's failure to present evidence in support of his "absence" claim must be attributed to petitioner's lack of diligence during the state court proceedings. Accordingly, petitioner's "absence" claim does not involve a factual predicate that could not have been previously discovered through the exercise of due diligence. See Isaacs, 300 F.3d at 1249-50; Hall, 310 F.3d 683, 698 ("because Hall's ineffective assistance of counsel claim is based on evidence that existed at the time of the state hearing, and that any lack of evidence stems directly from Hall's failure to diligently develop it, Hall's claim does not involve 'a factual predicate that could not have been previously discovered through the exercise of due diligence.'"). Moreover, because his own trial counsel has testified under oath that petitioner was, in fact, present when Ms. Ferrell was recalled for questioning, petitioner has not demonstrated that, pursuant to § 2254(e)(2)(B), "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." See Davis v. Turpin, 94-v-162, Dec. 16, 1999 Hr'g Tr. At 135, 179.

Because petitioner failed to develop his "absence" claim in state court, has not alleged that his "absence" claim relies on a new rule of constitutional law, has not presented a factual predicate which could not have been previously discovered through the exercise of due diligence, and has not demonstrated that, but for constitutional error, no reasonable factfinder would have found him guilty, petitioner is not entitled to an evidentiary hearing on his "absence" claim. 28 U.S.C. § 2254(e)(2); Breedlove, 279 F.3d 952, 959-60 (§ 2254(e) requires habeas petitioners to be diligent in presenting the factual bases of their federal claims to state courts, and . . . a failure to do so will result in the denial of an evidentiary hearing in federal court (unless the statute's other

stringent requirements are met)."); see also Michael Williams, 529 U.S. 420, 437, 120 S.Ct. 1479, 1491 ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."). The Court thus declines to hold an evidentiary hearing with respect to petitioner's "absence" claim.

C. State Misconduct (Claim IV)

In his federal habeas corpus petition, petitioner alleges that "the state withheld material exculpatory evidence, and false testimony was presented, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." Doc. 2 at 19. In particular, petitioner points to: the state's presentation at trial of Kevin McQueen's testimony that petitioner had confessed to the shooting of Officer McPhail; the state's failure to disclose until after the close of evidence in petitioner's trial that Dorothy Ferrell previously had contacted the district attorney's office about obtaining assistance in return for her testimony in petitioner's case; and the conduct of law enforcement officers in interviewing witnesses. See id. at 19-24. In support of his motion for an evidentiary hearing on this claim, petitioner has submitted the affidavits of Ms. Ferrell and Messrs. McQueen, Holmes, Young, Williams and Collins.

At the state habeas hearing, petitioner offered the December 6, 1996 affidavit of Kevin McQueen in support of his claim that the state had presented false evidence. Petitioner offered no evidence in support of his contentions that law enforcement improperly pressured witnesses or that the district attorney's office improperly failed to disclose its contacts with Ms. Ferrell.

1. Withholding of information and pressuring witnesses

To determine whether petitioner has "failed to develop the factual basis of [his] claim" in the state court proceedings pursuant to AEDPA § 2254(e), the Court first must ask

"whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer." Michael Williams, 529 U.S. 420, 431, 120 S.Ct. 1479, 1487. Here the answer is no. As discussed above, it appears that petitioner offered no factual basis at the state habeas corpus hearing for his contention that the state withheld information and pressured witnesses, and thus failed to develop a record in support of such claim.

The Court next considers whether petitioner made a reasonable attempt, in light of information available at the time, to investigate and pursue his claims in state court. Michael Williams, 529 U.S. 420, 435, 120 S.Ct. 1479, 1490. The Court concludes that petitioner did not. Petitioner was aware of his claims with respect to Ms. Ferrell as soon as she made her second appearance during petitioner's trial. He raised such claims in his motion for new trial, on direct appeal and in his state habeas proceeding. Similarly, petitioner was aware of his "pressuring witnesses" claim at the time of trial because, as discussed above, several witnesses testified at trial that they had been pressured by law enforcement officers with respect to making their statements and identifying petitioner.[8] See also Wells Aff. At 20 ("I have had an opportunity to review affidavits gathered by Mr. Davis' counsel after I left the Resource Center and withdrew from the case. The information contained in these affidavits dealing with manufactured testimony on the part of State witnesses, additional information incriminating Sylvester Coles, and evidence otherwise pointing to Mr. Davis' innocence and/or other mitigating factors is precisely the information I believed was available to support Mr. Davis' constitutional claims for relief-and which was available at the time of Mr. Davis' trial.").

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[8] In addition to Mr. Collins, Benjamin and Craig Young also testified at petitioner's trial that the police had pressured them into making statements. See Trial Tr. At 1200-1214.

Petitioner, clearly aware of his claim, had ample time and opportunity to develop evidence in support of such claim, as the evidentiary hearing occurred more than three and a half years after his original petition for habeas corpus and more than five years after trial. Petitioner had ample opportunity to present the factual basis for his withholding of information and pressuring of witnesses claims at the state court's evidentiary hearing, and yet failed to do so.

The Court therefore finds that petitioner's failure to present evidence in support of his withholding of information and pressuring of witnesses claim must be attributed to petitioner's lack of diligence during the state court proceedings. Accordingly, such claims do not involve a factual predicate that could not have been previously discovered through the exercise of due diligence. See Isaacs, 300 F.3d at 1249-50; Hall, 310 F.3d 683, 698. Because petitioner failed to develop in state court his claims that the state improperly withheld information and pressured witnesses, has not alleged that such claims rely on a new rule of constitutional law and has not presented a factual predicate which could not have been previously discovered through the exercise of due diligence, petitioner is not entitled to an evidentiary hearing on his withholding of information and pressuring of witnesses claim. 28 U.S.C. § 2254(e)(2); Breedlove, 279 F.3d at 959-60; see also Michael Williams, 529 U.S. 420, 437, 120 S.Ct. 1479, 1491. Consequently, even if petitioner could "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," 28 U.S.C. § 2254(e)(2)(B), petitioner nevertheless is not entitled to an evidentiary hearing. See 28 U.S.C. § 2254(e)(2) (requiring petitioner to meet (A)(i) or (ii) *and* (B)).

2. Offering false testimony

At the state evidentiary hearing, petitioner offered into evidence Kevin McQueen's December 6, 1996 affidavit stating that petitioner had not, in fact, confessed to shooting Officer McPhail. Petitioner seeks an evidentiary hearing to

further develop his claim that the state unconstitutionally offered false testimony when it called Mr. McQueen to the stand. While the state habeas court admitted such affidavit for the purpose of taking it under consideration, the state court apparently did not consider it because the state court concluded that petitioner's state misconduct claim, other than as it related to Ms. Ferrell, had been procedurally defaulted. See Davis v. Turpin, 94-v-162, Dec. 16, 1996 Hr'g Tr. at 92; Sept. 9, 1997 Order at 1, 30-31. Petitioner offered no other evidence, and no testimony, in support of his false testimony claim.

The Court finds that even though petitioner presented Mr. McQueen's affidavit at the state court's evidentiary hearing, petitioner nevertheless is not entitled to a hearing with respect to his false testimony claim. In reaching this conclusion, the Court finds instructive the Eleventh Circuit's analysis in Isaacs v. Head. In Isaacs, the Eleventh Circuit considered whether a district court properly had denied a habeas petitioner's motion for an evidentiary hearing in order to reconstruct the prayer with which his trial began. In finding that the district court did not err in denying the petitioner's motion, the Eleventh Circuit stated as follows:

> As the district court pointed out, Isaacs was aware of the failure to record the prayer at least by the time of his direct appeal. He had opportunities to reconstruct the contents of the prayer both during the new trial proceedings, which were conducted more than five months after his conviction and sentence, and again when the Georgia Supreme Court remanded the case to the trial court to permit the reconstruction of another portion of the record. On both occasions he failed to do so. Isaacs was also allowed to present evidence concerning the contents of the invocation during state habeas proceedings, at which time he was able to question several of the relevant

> participants from his trial. Therefore, we believe that any failure to reconstruct the contents of the prayer at this stage, over 10 years after he became aware of the omission from the trial transcript, must be attributed to Isaacs' lack of diligence during the state court proceedings.

Isaacs, 300 F.3d at 1249-1250.

In the case at bar, petitioner was aware of the alleged false testimony as soon as it was uttered by Mr. McQueen at petitioner's trial. He had ample time and opportunity to develop the factual basis of his false testimony claim during his motion for new trial, on direct appeal and during his state habeas corpus proceedings. At the state evidentiary hearing, more than three and a half years after his original petition for habeas corpus and more than five years after trial, petitioner was unrestricted in his ability to present evidence and call witnesses concerning such alleged false testimony. Petitioner, however, chose to present only on the affidavit of Mr. McQueen. Petitioner did not call Mr. McQueen, or any other witnesses, to testify with respect to this claim.

As evidenced by the date of Mr. McQueen's affidavit, petitioner was in contact with Mr. McQueen within ten (10) days of the date of the state court hearing. Petitioner's failure to obtain more information from Mr. McQueen than contained in his affidavit, or to subpoena Mr. McQueen or other witnesses to further explore at the state evidentiary hearing the substance of petitioner's false testimony claim, constitutes a failure to further develop the factual basis of his claim. Accordingly, the Court finds that any failure to further develop his false testimony claim by this stage, more than eleven years after he became aware of McQueen's alleged false testimony at trial, must be attributed to petitioner's lack of diligence during the state court proceedings.

Applying § 2254(e)(2)(A)(ii), the Court finds that because petitioner's false testimony claim is based on evidence that existed at the time of the state hearing, and because any lack of evidence stems directly from petitioner's failure to diligently develop it, petitioner's false testimony claim does not involve "a factual predicate that could not have been previously discovered through the exercise of due diligence." See Hall v. Head, 310 F.3d at 698. Because petitioner failed to develop in state court his claim that the state presented false testimony, has not alleged that such claim relies on an new rule of constitutional law, and has not presented a factual predicate which could not have been previously discovered through the exercise of due diligence, petitioner is not entitled to an evidentiary hearing on his false testimony claim. 28 U.S.C. 2254(e)(2); Breedlove, 279 F.3d at 959-60; see also Michael Williams, 529 U.S. 420, 427, 120 S.Ct. 1479, 1491. Consequently, even if petitioner could "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," 28 U.S.C. § 2254(e)(2)(B), petitioner nevertheless is not entitled to an evidentiary hearing. See 28 U.S.C. § 2254(e)(2) (requiring petitioner to meet (A)(i) or (ii) *and* (B)). The Court thus declines to hold an evidentiary hearing with respect to petitioner's false testimony claim.

The Court does, however, regard the affidavit of Mr. McQueen, admitted by the state habeas court for consideration, to be a part of the record in this federal habeas corpus action. In the event that the Court determines that petitioner's false testimony claim has not been procedurally default, see Doc. 21, the Court shall consider Mr. McQueen's affidavit when reaching the merits of petitioner's claim.

D. Petitioner's Ineffective Assistance Claim (Claim VI)

Petitioner contends that he was denied effective assistance of counsel at trial, in his motion for new trial and on direct appeal. See Doc. 2 at 37. Specifically, he faults

counsel for having failed to present evidence that petitioner did not shoot Michael Cooper at the Cloverdale party-in order to counter the state's theory of a link between the Cloverdale shooting and the shooting of Officer McPhail-and for having failed to present evidence to support petitioner's theory that Red Coles shot Officer McPhail. Id. at 37-38.[9]

In support of his motion for an evidentiary hearing on this claim, petitioner has submitted the affidavits of Joseph Washington, Tonya Johnson, Joseph Blige, April Hester and Lamar Brown, which he presented at the state habeas corpus evidentiary hearing. These affidavits indicated that: Red Coles was at the Cloverdale party (April Hester); Red had a gun on the night in question (Tonya Johnson); Red looked nervous after the shooting of Officer McPhail (April Hester); and that petitioner did not have a conflict with Michael Cooper at the Cloverdale party (Joseph Blige and Lamar Brown). Additionally, Joseph Washington stated, as he testified at petitioner's trial, that Red Coles shot Officer McPhail. Petitioner also offers for the first time in this federal habeas corpus proceeding the affidavits of Harriet Murray, Anthony Hargrove, Shirley Riley, Darold Taylor, Gary Hargrove, Abdus-Salam Karim, Anita Dunham Saddler, D.D. Collins, and April Hester Hutchinson, which further support his theory that petitioner did not shoot Officer McPhail and suggest that Red Coles has confessed to having shot Officer McPhail.

At the state habeas corpus hearing, petitioner did not call Washington, Blige, Brown, Johnson or Hester to testify. Although the state habeas court admitted their affidavits for the purpose of taking them under consideration, the state court apparently did not consider the substance of such

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[9] While petitioner alleges ineffective assistance based on many other actions and inactions of counsel, see Doc. 2 at 50-57, his motion for an evidentiary hearing on his ineffective assistance claim relates only to his contention that he did not shoot either Michael Cooper or Office McPhail. See Doc. 38.

affidavits in ruling on petitioner's habeas corpus petition. See Davis v. Turpin, 94-v-162, Dec. 16, 1996 Hr'g Tr. At 84, 87, 92-97; Sept. 9, 1997 Order.[10]

The Court finds that even though petitioner presented several affidavits at the state court's evidentiary hearing, petitioner nevertheless is not entitled to a hearing with respect to his ineffective assistance claim. In reaching this conclusion, the Court again finds instructive the Eleventh Circuit's analysis in Isaacs v. Head, which the Court discussed with respect to Kevin McQueen, above See Isaacs, 300 F.3d at 1249-1250.

In the case at bar, petitioner argued at the time of trial that Red Coles, and not petitioner, shot Officer McPhail, and presented trial testimony to that effect. Petitioner had ample time and opportunity to develop the factual basis of his ineffective assistance claim during his state habeas corpus proceedings. See Sept. 9, 1997 Order at 41 ("Although the failure to discover, admit or effectively argue the importance of [exculpatory] items of evidence would appear to place this case in the category of a case of 'mistaken identity,' the court finds from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies in the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during Davis' trial.").

At the state evidentiary hearing, more than three and a half years after his original petition for habeas corpus and

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[10] The state habeas court found that petitioner's claim of ineffective assistance at trial was procedurally barred. See Davis v. Turpin, 94-v-162, Sept. 9 Order at 8. The state court did, however, consider petitioner's claim of ineffective assistance at motion for new trial and on appeal and found, generally, "that appellate counsel was effective in raising those issues [regarding exculpatory evidence] which were of benefit to [petitioner] and that their performance was not deficient." Id. at 16.

more than five years after trial, petitioner was unrestricted in his ability to present evidence and call witnesses concerning his own innocence and Mr. Coles's guilt. Petitioner, however, chose to present only the affidavits mentioned above, and did not call any of the affiants to testify with his respect to his contention that Red Coles was the responsible party.

Petitioner's failure to obtain more information from the affiants than contained in their affidavits, or to subpoena the affiants or other witnesses to further explore at the sate evidentiary hearing the substance of petitioner's "actual innocence" claim constitutes a failure to further develop the factual basis of his claim. Accordingly, the Court finds that any failure to further develop his ineffective assistance claim by this stage, more than eleven years after he propounded his theory at trial that Red Coles shot Officer McPhail, must be attributed to petitioner's lack of diligence during the state court proceedings.

Applying § 2254(e)(2)(A)(ii), the Court finds that because petitioner's ineffective assistance claim is based on evidence that existed at the time of the state hearing, and because any lack of evidence stems directly from petitioner's failure to diligently develop it, petitioner's ineffective assistance claim does not involve "a factual predicate that could not have been previously discovered through the exercise of due diligence." See Hall v. Head, 310 F.3d at 698. Because petitioner failed to develop in state court his claim that his counsel was ineffective for failing to develop his theory that Red Coles shot Officer McPhail, has not alleged that such claim relies on a new rule of constitutional law, nor presented a factual predicate which could not have been previously discovered through the exercise of due diligence, petitioner is not entitled to an evidentiary hearing on his ineffective assistance claim. 28 U.S.C. 2254(e)(2); Breedlove, 279 F.3d at 959-60; see also Michael Williams, 529 U.S. 420, 437, 120 S.Ct. 1479, 1491. Consequently, even if petitioner could "establish by clear and convincing

evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," 28 U.S.C. § 2254(e)(2)(B), petitioner nevertheless is not entitled to an evidentiary hearing. See U.S.C. § 2254(e)(2) (requiring petitioner to meet (A)(i) or (ii) *and* (B)). The Court thus declines to hold an evidentiary hearing with respect to petitioner's ineffective assistance claim.

The Court does, however, regard the affidavits of Ms. Hester, Ms. Johnson, and Messrs. Blige, Brown and Washington, admitted by the state habeas court for its consideration, to be a part of the record in this federal habeas corpus action. In the event that the Court determines that portions of petitioner's ineffective assistance claim have not been procedurally defaulted, see, Doc. 21, the Court shall consider such affidavits when reaching the merits of petitioner's ineffective assistance claim.

E. Petitioner's contention that a lack of funding at the state habeas level excuses his failure to develop his claims in the state habeas proceedings

As he did in support of his motion for discovery (see Doc. 29), petitioner again argues that his failure to develop his claims in the state habeas corpus proceedings was due not to a lack of diligence, but rather to lack of funding. See Doc. 38 at 79-86. The Court again rejects this argument and finds, as noted herein, that petitioner has not demonstrated the requisite diligence to overcome his failure to develop, or further develop, the factual basis of his claims during the state habeas corpus proceedings. He clearly was aware of such claims, as is evidenced by his amended state habeas corpus petition. See Davis v. Turpin, 94-v-162, Am. Pet. For Writ of Habeas Corpus at 17-36 (discussing petitioner's contentions that: Red Coles committed the relevant murder; the testimony offered at trial by Dorothy Ferrell and Darrell Collins had been severely undermined; a "wealth of information existed that could have discredited" many of the state's witnesses; and that evidence favorable to petitioner

was not presented at trial). Petitioner has not explained to the Court's satisfaction why he did not employ his subpoena power to call as witnesses at the December 1996 evidentiary hearing any of the affiants discussed herein, or why he did not prepare the newly submitted affidavits prior to such hearing.

Finally, as petitioner has conceded, Georgia does not provide counsel in state habeas corpus proceedings to inmates who have been sentenced to death. See Gibson v. Turpin, 270 Ga. 855, 513 S.E.2d 186 (Ga. 1999). As the state habeas court noted, absent the right to appointment of counsel, it necessarily follows that habeas petitioners have no right to an award of funds for the expenses incurred by counsel in pursuing the habeas petition. See Davis v. Turpin, 94-v-162, Sept. 9, 1997 Order at 42, citing State v. Davis, 246 Ga. 200, 201-02 (Ga. 1980). Until the appropriate legislative body provides otherwise, the Court therefore cannot find that a lack of funds excuses a habeas petitioner's lack of diligence in state habeas corpus proceedings.

V. Petitioner's request for oral argument

Petitioner has requested that the Court exercise its discretion to allow oral argument with respect to petitioner's motion for an evidentiary hearing. See Doc. 42. Because the Court was able to rule on petitioner's motion for an evidentiary hearing on the pleadings, the Court therefore DENIES petitioner's request for oral argument (Doc. 42).

VI. Petitioner's motion for expert assistance

In its September 19, 2002 Order (Doc. 32), the Court reserved ruling on petitioner's motion for expert assistance until the Court was able to determine whether to hold an evidentiary hearing. Because the Court has denied petitioner's motion for an evidentiary hearing, it likewise DENIES petitioner's motion for expert assistance (Doc. 28). See Lawson v. Dixon, 3 F.3d 743, 753 (4th Cir. 1993) (holding that because petitioner was not entitled to an evidentiary hearing, there was no "reasonable necessity" for an expert's appointment); see also Cardwell v. Netherland,

971 F.Supp. 997, 1008 (E.D. Va. 1997) (experts not reasonably necessary if evaluations cannot be introduced); Burris v. Parke, 948 F.Supp. 1310, 1327 (N.D. Ind. 1996) (experts not reasonably necessary where evidence cannot be introduced because petitioner is not entitled to an evidentiary hearing), aff'd, 116 F.3d 256 (7th Cir. 1997).

VII. Scheduling Order

Petitioner may submit a pleading briefing the merits of his habeas corpus claims no later than thirty (30) days after the date of this Order. Respondent may submit a responsive pleading no later than sixty (60) days after the date of this Order. Neither party's pleading shall exceed sixty (60) pages. To be considered, each pleading must be file-stamped by the Clerk's office no later than 5:00 p.m. on the date such pleading is due. **No extensions shall be granted.**

The parties are instructed to brief the merits of all of petitioner's claims, including those claims that respondent believes to be procedurally defaulted.[11] The parties need not re-brief the issue of procedural default, however, as such issue ahs been fully presented. In their respective pleadings, the parties shall, to the extent possible, specify which evidence or legal argument is offered in support of, or in opposition to, which claim.

So ORDERED.

s/ JOHN F. NANGLE
UNITED STATE DISTRICT JUDGE

Date: March 10, 2003

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[11] The Court has not yet determined whether any of petitioner's claims have been procedurally defaulted, or whether any procedural default has been excused.